No. 06-

IN THE

Supreme Court of the United States

DEADRIA FARMER-PAELLMANN on behalf of herself and other similarly situated persons of African-American slave descent and the class she represents,

Petitioners,

v.

BROWN & WILLIAMSON TOBACCO CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Fourteenth Amendment due process requires an evidentiary hearing to determine if the period of limitations must be equitably tolled to permit slave descendants to bring actions against banks and insurance companies for disgorgement of profits (earned in contravention of Northern anti-slavery laws) from slave financing and slave insurance?

Did the courts below fail to protect plaintiffs' Fourteenth Amendment due process rights by failing to conduct an evidentiary inquiry as to tolling of the period of limitations before dismissing the action?

Do the children of former U.S. slaves and other slave descendants have standing to bring actions seeking disgorgement by banks and insurance companies unjustly enriched via slave financing and slave insurance profits under state law equity principles?

PARTIES TO THE PROCEEDINGS

Petitioners

Deadria Farmer-Paellmann on behalf of herself and other similarly situated persons of African-American slave descent and the class she represents.

Respondents

FleetBoston Financial Corporation, CSX Corporation, Aetna Inc., Brown Brothers Harriman & Company, New York Life Insurance Company, Norfolk Southern Corporation, Lehman Brothers Corporation, Lloyd's of London, Union Pacific Railroad, JP Morgan Chase, R.J. Reynolds Tobacco Company, Brown and Williamson, Liggett Group Inc.,Canadian National Railway, Southern Mutual Insurance Company, American International Group ("AIG"), and Loews Corporation.

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OPINIONS BELOW

The Court of Appeals for the Seventh Circuit in an opinion dated December 13, 2006 reversed in part and modified and affirmed in part and remanded to the District Court. The Court of Appeals for the Seventh Circuit, in reversing, ruled that plaintiffs consumer protection claims could proceed but affirmed that the plaintiffs other claims must be dismissed because the statute of limitations had expired and because plaintiffs have no standing.

The opinion is attached as Appendix A.

The District Court Opinion and Order dated July 6, 2005 dismissed all of plaintiff's claims with prejudice. This opinion is attached as Appendix B.

JURISDICTION

The Court of Appeals for the Seventh Circuit in an opinion dated December 13, 2006 reversed in part and modified and affirmed in part.

The District Court Opinion and Order dated July 6, 2005 dismissed all of plaintiff's claims with prejudice

Mr. Justice Stevens granted an extension until May 12, 2007 for the filing of this petition for writ of certiorari; since May 12, 2007 falls on a Saturday, it is timely filed on May 14, 2007.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

Jurisdiction below was based on diversity and 42 U.S.C. § 1982.

RELEVANT PROVISIONS INVOLVED

See attached appendix.

STATEMENT OF THE CASE

Deadria Farmer-Paellmann – the lead plaintiff in this litigation – may well become known to future generations as the "Rosa Parks" of the movement to seek restitution from corporations that illegally profited from the heinous institution of American slavery.

Ms. Farmer-Paellmann is a descendant of the Gullah Gechee people: a homogenous group of slave descendants from the coastal regions of Georgia and South Carolina. Her maternal great-great grandfather and great-great grandmother, Abel and Clara Hines, toiled as slaves on a rice plantation on Saint Helena Island, a sea island in Beaufort County, South Carolina. Her African ancestry (identified by DNA testing) links Ms. Farmer-Paellmann to the Mende ethnic group of Sierra Leone.

Ms. Farmer-Paellmann's mother, Wilhelmina Farmer, a divorced mother of six, raised her daughters alone on a limited income in depressed East New York. Eventually, the family moved to the predominantly white neighborhood of Benson Hurst, Brooklyn where they experienced racism first-hand. They were harassed constantly, Farmer-Paellmann told the *New York Times* in an interview, and subjected to physical violence. "Probably not a day went by when I didn't hear [a racial slur]. It seemed like every time the window was repaired, something would get thrown through it again."

Ms. Farmer-Paellmann decided to give up pursuing her talent for classical music and instead earned a degree in political science from Brooklyn College and a masters degree

from George Washington University. In 1992 she participated in a vigil near Manhattan's City Hall. She and the other protesters were trying to prevent the excavation of a seventeenth-century African burial ground in order to create a new parking lot. She was allowed onto the site one day, where some 20,000 black Americans had been laid to rest generations earlier, and realized that they, too, "lived, worked and died in this city, and they never got their reparations," she told the *New York Times*. "It moved me."

Motivated by this event and her own family's history, Ms. Farmer-Paellmann decided to obtain a law degree in order to pursue the cause of reparations. She obtained her degree from the New England School of Law in 1999 but had by then learned that various claims for reparations from the United States government had been denied either by the Judicial or Legislative branches. It was while doing her own genealogical research for a paper on reparations that Ms. Farmer-Paellmann hit upon the idea that is the subject of this case: What was the involvement, if any, of American corporations in the institution of slavery and what was their legal liability?

Ms. Farmer-Paellmann invested her life's work pursuing a legal claim for reparations from corporations that unjustly enriched themselves by trafficking and even holding human slaves.

Only after extensive archival, genealogical and legal research did Ms. Farmer-Paellmann uncover the possibility that the corporations named as defendants may have participated in financing, insuring and underwriting not only the slave trade but the operations of ante-bellum plantations.

Because some of the records were vague or ambiguous, Ms. Farmer-Paelmann spent years writing and phoning corporations that her research indicated might have participated in slavery. She was met with repeated denials, delays and obfuscation.

Her difficulty obtaining records motivated major American cities and States – including California, Philadelphia, Chicago and Los Angeles — to pass legislation requiring corporations to disclose their participation in slavery before those corporations could be awarded city contracts. One government mandated disclosure report listed her great-great grandfather Abel as an insured by Aetna.

Both the District Court and the Appellate court below predicate their rulings that plaintiffs claims are time barred – and therefore that plaintiffs have no standing – on the premise that African-Americans knew as early as the 1950s that corporations financially underwrote slavery. Seventh Circuit judges Posner, Easterbrook and Manion write: "And it's not as if it had been a deep mystery that corporations were involved in the operation of the slave system." *See* Appendix A at p. 15a *citing e.g.*, Edgar J. McManus, *Black Bondage in the North* 174 (1973); Kenneth M. Stampp, *The Peculiar Institution: Slavery in the AnteBellum South* 397 (1956).

None of the corporate defendants named in this litigation are mentioned in the academic studies of slavery cited by the Seventh Circuit; indeed, those tomes merely mentioned generally that Northern corporations were involved with Southern slavery.

The Seventh Circuit would have Americans believe that once an academic wrote a book in the 1950s African-

Americans should have been on notice of claims against unnamed corporations. They would have us further believe that African-Americans at the time had the capacity to forgo the struggle to obtain decent schooling, to obtain equal access to public accommodations, to obtain equal access to courts and to even secure the right to vote in order to file a claim against unspecified financial institutions. Only a jurisprudence devoid of historic sensibility could claim that African-Americans in the 1950s and 1960s — worried about being beaten, lynched, shot with water cannons and set upon by dogs – had the capacity to unearth the hidden history of illegal (under Northern laws) corporate slave operations in libraries that denied African-Americans entrance.

Even with all of the hard-fought civil rights achieved by her ancestors, Ms. Farmer-Paellmann has had to devote her life and make Herculean efforts to uncover the little truth that is known about the involvement of these defendants in the vicious institution of slavery. Despite these efforts, the defendant corporations persistently engaged in fraudulent and misleading efforts to deny their involvement in slavery.

Perhaps most dastardly were the public false statement made by representatives of the JP Morgan Chase Bank denying, as late as March 5, 2004, that they were at all involved in slavery. Here is what Frederick Hill, JP Morgan Chase Vice President, testified before the City Council of Chicago on that date:

> The research revealed no evidence to support the allegations that predecessor banks of Chase issued, underwrote, or financed slave-related insurance. We also found no evidence that any predecessor banks of Chase financed the slave trade or otherwise profited from slavery. In

> addition, Chase went beyond the allegations in Ms. Farmer-Paellmann's letter, and found that there is no evidence that any predecessor bank issued, underwrote, financed or profited from insurance issued on the lives or persons of slaves.

Only months later, on January 20, 2005, JP Morgan Chase released a letter indicating that this statement was a lie:

> Recently, JP Morgan Chase completed extensive research examining our corporate history for any links to slavery to meet a commitment to the City of Chicago. We are reporting that this research found that between 1831 and 1865 two predecessor banks . . . accepted approximately 13,000 enslaved individuals as collateral on loans and took possession of approximately 1, 250 enslaved individuals.

JP Morgan Chase went on to apologize for its role in slavery and agreed to contribute to a scholarship fund. But apologies and charitable work ought not to obfuscate the hard legal liabilities involved; disgorgement of the profits that JP Morgan Chase's predecessor bank earned financing and owning slaves is the proper remedy under the law.

After telling Ms. Farmer-Paellmann and the City of Chicago that JP Morgan Chase had no involvement in slavery, it actually turns out that the bank was a slave owner as well as a slave financier.

In denying, on March 5, 2004, any involvement in slavery, JP Morgan Chase bank indicated the extraordinary effort it undertook to research the historical record:

"Our research spanned two continents, three countries, seven U.S. States and the District of Columbia, and included major public and university collections, as well as in over 25 state and local historical archives."

Either Chase was deceiving Ms. Farmer-Paellmann and the legal system with its earlier denials and should be estopped from asserting a statute of limitations defense. Or Chase was being forthright about the difficulty of uncovering corporate involvement in the institution of slavery, in which case it should also be estopped from asserting a defense that plaintiffs sat on their rights. Put bluntly: How can a multinational corporation with bountiful resources tell Ms. Farmer-Paellmann and other African-Americans that they should have know years ago about corporate profiteering from slavery, when it took until 2005 for JP Morgan Chase to uncover or finally admit the truth?

The first complaint filed by Ms. Farmer Paellmann was on March 26, 2002. She was careful to file it within the two year statute of limitations after she began to learn in 2000 that some of the defendants might have been involved in financing slavery. Far from sitting on their rights, it is inconceivable that African-Americans could have filed a complaint before the painstaking, lengthy, improbable research assembled by Ms. Farmer-Paellmann emerged.

Contrary to intimations in the opinions below, plaintiffs specifically pled fraud and concealment by the defendant corporations. The following are excerpts from the plaintiffs Second Consolidated And Amended Complaint:

> 51. The nature of the complained of business dealings by the defendants, as discussed in more detail in those portions of this

Complaint, establishes that they were self-concealing from the enslaved African and African-Americans an by direct extension their descendents . . .

52. A number of the defendants have also over the years specifically and falsely denied having any connection to slavery.

53. The defendants have also fraudulently concealed the facts . . . from the heirs or the estate of the slaves and former slaves harmed by the defendant's participation in slavery. No defendant had disclosed any facts before two years prior to the filing of these suits which would provide the plaintiffs with notice of any facts of the cause of action as plead within this complaint . . .

54. Despite efforts, the plaints have been unable to secure records from a number of the defendants with regards to their ancestors due to the failure of most, if not all, to be able to reliably access documents establishing business relationships, ventures and dealings, contracts, shipping manifests, human cargo list that may directly connect the plaintiffs with their slave ancestors and their free ancestors . . .

55. Recent advanced in Internet and computer databases have made some of these records more accessible . . .

> 56. The defendants were unjustly enriched by the labor of plaintiff's ancestors and defendants actively concealed evidence of this participation in slavery and their conduct was instrumental in keeping plaintiffs fro obtaining the knowledge necessary to be aware of or on notice of the harms they suffered as a direct result of defendants conduct . . .

REASONS FOR GRANTING THE PETITION

This case presents an important issue of constitutional law deriving directly out of this nation's slave trade that will forever evade review if not heard by this Court. Remedy by disgorgement against those U.S. corporations still in existence that traded in slaves is a matter of intense public interest for vast numbers of Americans, particularly African-American slave descendants.

In affirming the dismissal by the District Court, the Seventh Circuit disregarded prevailing due process requirements that an evidentiary hearing be held where there is a disputed issue as to tolling the statute of limitations. The result of the affirmance, disregarding clear and non-ambiguous precedent, is that the question of disgorgement by defendants of slave trading profits earned from the American trade in human beings will never be heard in the federal courts and these questions will be forever silenced. Public interest in this question is intense as evidenced by the recent movement of states to apologize for slavery, a debate that has been consonant with the history of this litigation.

A. The Courts Below Are At Odds With Rulings In Other Circuits Requiring A Hearing As To The Tolling Of A Statute Of Limitations. The Supreme Court Needs To Resolve This Split.

The decision below is in direct conflict with rulings in other circuits that a claim that the statute of limitations is to be tolled is a factual question requiring an evidentiary hearing. *Melendez-Arroyo v. Cutler-Hammer de P.R. Co.*, 273 F.3d 30, 39 (1st Cir. 2001); *Mandarino v. Mandarino*, 2006 U.S. App. LEXIS 11927, 7-8 (2d Cir. 2006); *Aldrich v. McCulloch Properties*, 627 F.2d 1036, 1042 (10th Cir. 1980); *Coons v. Mineta*, 410 F.3d 1036, 1040-1041 (8th Cir. 2005); *United States v. Battles*, 362 F.3d 1195, 1198 (9th Cir. 2004); *Beaird v. Seagate Tech.*, 145 F.3d 1159, 1175 (10th Cir. 1998). By effectively reversing its own practice recognizing such hearings, *see Bensman v. United States Forest Service*, 408 F.3d 945 (7th Cir. 2005) and *Montenegro v. United States*, 248 F.3d 585 (7th Cir. 2001), the Seventh Circuit placed itself in a direct conflict with other circuits that have considered this question.

Judge Posner concluded "that tolling doctrines can extend the time to sue well beyond the period of limitations – *but not to a century and more beyond.*" 471 F.3d at 762. No authority was offered by either the District Court or the Court of Appeals for this holding and there is no principled reason why an action against an extant corporation cannot lie at such a distance.[1]

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1. The Seventh Circuit does not dispute that" purported representatives had a right to sue on behalf of their ancestors, and the defendants offer only a perfunctory rebuttal." App. at 14a. And federal courts have adjudicated disputes that are far older than 150

(Cont'd)

Being without authority, the affirmance is a major departure from accepted notions of due process recognized by every circuit – the First, Second, Eighth, Ninth and Tenth – that has considered whether an evidentiary hearing is required in a disputed issue of tolling the period of limitations. *See e.g.*, *Aldrich v. McCulloch Properties*, 627 F.2d at 1042 ("[W]hether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law . . . Dismissal of the securities claims on the pleadings was, therefore, improper."); *Mandarino v. Mandarino*, 2006 U.S. App. LEXIS at 7-8 (". . . the District Court should not have resolved the fact-specific equitable tolling issue on defendants' motion to dismiss."); *Coons v. Mineta*, 410 F.3d at 1040-1041 (reversing dismissal because District Court failed to hold evidentiary hearing on question of equitable tolling in discrimination action); *United States v. Battles*, 362 F.3d at 1198 (Because equitable tolling issues "are highly fact-dependent . . . we remand . . . to the District Court with instructions that it develop an adequate evidentiary record before again determining whether the statute of limitations

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(Cont'd)

years. The Supreme court has ruled that no statute of limitations applies to Indian Land claims, many of which are still being adjudicated in the 21st century over facts that took place in the 17th and 18th centuries. *Seneca Nation of Indians v. New York*, 26 F. Supp. 2d 555, *aff'd*, 178 F.3d 95 (2d Cir. 1999), *cert. denied*, *New York v. Seneca Nation of Indians*, 528 U.S. 1073 (2000). The court in this case granted summary judgment for the Seneca nation and after settlement talks, the nation received land that had been illegally taken from it. *See also Idaho v. Coeur D'alene Tribe of Idaho*, 521 U.S. 261 (1997). Thus, there is no practical barrier to adjudication of actions reaching, as Judge Posner put it, "to a century and more beyond", especially when, as here, the facts have now been admitted.

should be equitably tolled as to those claims.); *Melendez-Arroyo v. Cutler-Hammer de P.R. Co.*, 273 F.3d at 39 (directing that District Court hold hearing on equitable tolling claims); *Beaird v. Seagate Tech.*, 145 F.3d at 1175, *quoting Delmar v. Raytheon Aircraft Corp.*, 1996 U.S. Dist. LEXIS 12913, No. 96-1002- JTM, 1996 WL 499144, at *7 (D. Kan. Aug. 9, 1996) ("Tenth Circuit cases 'indicate a detailed factual inquiry is necessary to determine whether equitable tolling should be applied,' requiring 'in all likelihood, an evidentiary hearing' ".).

By ruling as they did, both the District Court and the Seventh Circuit made an effective finding of fact on a motion to dismiss that no basis exists on which the period of limitations ought to be tolled, a matter for which due process requires a detailed factual inquiry, *Beaird v. Seagate Tech.*, 145 F.3d at 1175, that "does not lend itself to determination as a matter of law", *Aldrich*, *supra*, and is improper for adjudication on a motion to dismiss. *Mandarino*, *supra*. By determining the non-availability of tolling without an evidentiary hearing, the Seventh Circuit and the district judge disregarded not only the precedent of every circuit that has considered this question, but also the prevailing practice in the Seventh Circuit. *Bensman and Montenegro*, *supra*.

Both the Seventh Circuit and the district judge seem to be burdened with the blinders of late 20th century liberality in their belief that these actions could have been commenced at any earlier date; such perspective conceals the reality of history in favor of a idealized version of American jurisprudence that never existed until the very recent past. Just when the former slaves or their descendants possessed sufficient knowledge as to the defendants' slave financing acts so as to be able to commence the action is a highly

specific question requiring "a detailed factual inquiry" as to whether equitable tolling should be applied". *Beaird, supra.* No defendant made any admissions as to their slave-trading and slave financing past until 2002 *at the earliest*, the year these actions were filed, and while several historical treatises did allude to the involvement of northern merchants and banks in the slave trade, 471 F.3d at 762, none of these identify the acts of these defendants that were not acknowledged until at least 2002. Moreover the knowledge of specialists such as Kenneth Stampp cannot be fairly imputed to the descendants of the freed slaves in the absence of public admissions by defendants of their slave financing conduct. . Defendants' conduct is the very example of "self-concealing" conduct that gives rise to tolling, regardless of the passage of time. *Thompson v. Metropolitan Life Insurance Company*, 149 F. Supp. 38, 54 n.18 (S.D.N.Y. 2001).

The factual impediments to the former slaves' action was well-known and need little explication: slaves were universally denied under strict criminal and corporal penalty the right to read or be educated and were wholly ignorant of the financial industry that made slavery possible; schools for the freed slaves were largely non-existent; freed slaves and their descendants until the early 1960's had virtually no access to the political system and their testimony against whites was rarely honored or heard in most parts of the country, access to the courts was difficult and often life-threatening, a fact acknowledged by the Seventh Circuit, 471 F.3d at 762, and few lawyers took cases on behalf of African-Americans for any purpose let alone rectifying the stolen wages of slavery.

While it is true as Judge Posner suggests that *some* courts in both the north and the south in the early 20th century would

have provided forums for slave descendants, no facts as to the specific acts of defendants were publicly available until at least 2002, the year this action was commenced.

Most tellingly, the defendants themselves concealed their slave trading acts from their own public filings and other public sources. For example, it was not until August 2005 that defendant Bank of America acknowledged any of its slave-financing past. Defendant JP Morgan Chase made no such acknowledgment until January, 2005 when forced to do so by the Chicago City Council as a condition for continued city contracts. New York Life and Aetna concealed their slave trading past until forced to do so by California insurance regulators in 2002. The Court of Appeals and the District Court before it ignored these evident factual issue with a broad brush asserting vaguely: "And it's not as if it had been a deep mystery that corporations were involved in the operation of the slave system". App. at 15a. The entire support for this assertion by Judge Posner (that obviously implies that the freed slaves or their descendants could earlier have brought the action based on the date of publication of these works) is the citation to the two treatises, McManus, *Black Bondage in the North* 174 (1973) and Stampp, *The Peculiar Institution: Slavery in the AnteBellum South*, 397 (1956), works read almost entirely by specialists and which contain only the most general assertion as to the actions of northern merchants in the slave trade. In any event, such "general public awareness", *Thompson* at 50, does not put plaintiffs on inquiry notice of their claim. *Id.* Judge Posner sustained the dismissal on the ground that the action could have and, therefore, should have been brought at least as of the date of the publication of these two works. In point of fact, neither of these treatises would have supported the maintenance of an action for disgorgement of slave profits

as they do not identify the companies involved. *See, e.g.*, Stampp at 397 where the author refers only generally to the involvement of northern "merchants" in the slave trade. As the court recognized in *Thompson*, it is unreasonable to attribute such knowledge to the "reasonable" slave descendant. *Thompson, supra.*

Such arguments represent at best an attempt to controvert proofs that the plaintiffs would offer to demonstrate their inability to have brought these actions earlier due to the lack of knowledge as to the defendants' involvement in slave trading and financing, none of which was disclosed until at least 2002, the year in which the combined actions were filed. Such assertions as set forth in Judge Posner's opinion demonstrate at best the existence of a factual question as to when the former slaves and their descendants possessed sufficient knowledge to bring these actions, an issue not for the determination by the court as a matter of law but only as a matter of fact after an evidentiary hearing. *See, e.g., Thompson v. Metropolitan Life, supra* at 50 n.9. ("The determination of whether a plaintiff was put on 'inquiry notice' of his or her claim is clearly a question of fact.")

Every other circuit that has considered tolling questions has held that the question of when the plaintiff was first aware of the basis of her suit is not a question of law and is improperly determined on a motion to dismiss. *See, e.g., Mandarino v. Mandarino*, 2006 U.S. App. LEXIS 11927, 7-8 (2d Cir. 2006) (". . . the District Court should not have resolved the fact-specific equitable tolling issue on defendants' motion to dismiss."); *Coons v. Mineta*, 410 F.3d 1036, 1040-1041 (8th Cir. 2005) (reversing dismissal because District Court failed to hold evidentiary hearing on question of equitable tolling in discrimination action); *United States v. Battles*, 362 F.3d 1195,

1198 (9th Cir. 2004) (Because equitable tolling issues "are highly fact-dependent . . . we remand . . . to the District Court with instructions that it develop an adequate evidentiary record before again determining whether the statute of limitations should be equitably tolled as to those claims.); *Melendez-Arroyo v. Cutler-Hammer de P.R. Co.*, 273 F.3d at 39 (directing that District Court hold hearing on equitable tolling claims); *Beaird v. Seagate Tech.*, 145 F.3d 1159, 1175 (10th Cir. 1998), *quoting Delmar v. Raytheon Aircraft Corp.*, 1996 U.S. Dist. LEXIS 12913, No. 96-1002- JTM, 1996 WL 499144, at *7 (D. Kan. Aug. 9, 1996) ("Tenth Circuit cases 'indicate a detailed factual inquiry is necessary to determine whether equitable tolling should be applied,' requiring 'in all likelihood, an evidentiary hearing' ".).

As they did with this basic due process question, the courts below further misconstrued the notion of standing. Contrary to the Seventh Circuit and the District Court's repeated assumption, plaintiffs have repeatedly disavowed any claim of personal recovery from the defendants:

> Nowhere do the plaintiffs make the claim that they "are entitled to some of Defendants' profits" [citation to record below deleted]. Rather, their claim is that the defendants who attained ill-gotten profits through enslavement should not, under equitable principles, be permitted to retain such earnings that should be deposited into a public trust under cy pres principles. Disgorgement, being directed to depriving "wrongdoers of ill-gotten gains," *CFTC v. Hunt*, 591 F.2d 1211, 1222 (7th Cir. 1979), is "not [intended] to compensate the victims . . ." *Estate of Pidcock v. Sunnyland America, Inc.*, 726 F. Supp. 1322 (S.D. Georgia, 1989); *and plaintiffs make no such claim.*

Appellate Brief of Farmer-Paellmann at 12 [emphasis added].

Plaintiffs have repeatedly averred that they seek only an order that defendants disgorge their retained profits from slave financing and trading into a public benefits trust to benefit African American slave descendants under state law unjust enrichment principles. As this Court has noted, standing is not a rigid, inflexible doctrine and "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *see also Allen v. Wright*, 468 U.S. 737, 751 (1984)(standing, even in light of "prudential" concerns, is a highly variable concept that must be tailored to the nature and character of the particular action, not employed as a reflexive instrument of dismissal). Plaintiffs' standing must therefore be seen in context of the nature of their requested remedy: since plaintiffs do not seek personal recovery, the courts below should not have conditioned their standing on proof of a direct link between their slave ancestor and individual defendants. Finally, it was error for the courts below to consider standing questions before the issue of tolling was determined.

Standing follows naturally from the resolution of the question of the date to which the action was tolled since the only persons who could commence the action are those in life at the time of tolling. It is self-evident that the inquiry as to standing of slave descendants to commence the action would be fundamentally affected by a finding that the action was tolled until 2002 or later, when the defendants began to admit their slave financing histories. If the action could not have been commenced earlier due to defendants' concealment of their slave financing and slave insuring acts, then it is self-evident that the only persons who could commence the action are the descendant alive today. Viewed in this light it was manifest error for the courts below to consider standing questions before a factual hearing on tolling of the period of

limitations., Since the former slaves themselves could not bring the action due to the defendants' concealment until at least the year 2002 of their slave financing and insurance acts, Farmer-Paellmann and the other plaintiffs in life today, not only have a concrete interest in the outcome of the litigation, *see, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1990), *citing Lujan v. National Wildlife Federation*, 497 U.S. 871, 883-889 (1990), but they are the only persons who could as theirs is the first generation to have the factual knowledge on which to commence the action.

For the trial court and the Seventh Circuit to have inferred on a motion to dismiss, in the absence of a hearing or evidentiary submissions, that the plaintiffs' actions could have been brought at some unstated earlier date based on the contents of two general works of history that make no reference to the defendants or their acts and to fail to accord an evidentiary hearing on the most basic issue in the case – the tolling question – is to deny basic due process in a matter of breathtaking historic dimensions that deeply and compellingly affects the public interest. The courts below abnegated their duty to protect these plaintiffs by failing to accord a hearing on the predicate factual issues in a case of the greatest historic magnitude. Plaintiffs and their ancestors were earlier prevented from bringing this action by the defendants' decades-long concealment of their slave financing and slave insuring past and were equally denied the right to try their claims by the unwillingness of the courts below to see this simple historical reality. If this Court does not accept the Petition, the opportunity to fully and fairly litigate these issues will be forever lost to this Nation.

B. The Supreme Court Must Decide The Limits Of Article III Standing.

The action should have been seen as akin to the toxic and mass tort claims in which plaintiff need only show proof of injury from the tort where proof of defendant's direct causation is not possible. *Dement v. Olin-Mathieson Chemical Corp.*, 282 F.2d 76, 82 (5th Cir. 1960) (citation omitted); *Hall v. E. I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 375 (E.D.N.Y. 1972).

As seen in *Dement*, *supra*, federal courts have recognized in certain circumstances that the absence of direct causation does not doom Article III standing and has been dispensed with in cases where it cannot be determined which of a group of collective wrongdoers caused an individual's harm:

> [C]ourts recognize joint liability against actors completely independent and unrelated to each other in circumstances where their conduct has caused indivisible injury which cannot be accurately apportioned and identified by the plaintiff.

Dement, 282 F.2d at 82; *Hall v. E. I. Du Pont de Nemours & Co.*, 345 F. Supp. at 375.

Where a wrong is known to have been imposed by multiple actors among a class of victims causing "indivisible injury which cannot be accurately apportioned and identified by the plaintiff," *Dement*, *supra*, liability can be imposed collectively among those known tortfeasors even without direct evidence of harm by a particular defendant to a particular plaintiff. Any contrary rule would enable tortfeasors whose acts are indivisible from one another and

which effectively enhanced each other's position, to escape liability. To avoid such unjust result, the federal courts have accepted "a shift of the burden of proving causation to the defendants." *Hall* at 374. Rather than dismiss the action for lack of individualized proof that any *particular* defendant victimized any *particular* ancestor or parent, the District Court should have denied the motion on the ground that defendants' collective conduct in slave trading, financing, insuring and profiteering causes the burden of proof to shift to the defendants. *Id.*, *citing* Rest. 2d Torts § 433B (1965). Certainly, on a motion to dismiss the presumption must favor plaintiffs and, in any event, such factual analysis must await a motion for summary judgment.

In *James v. Bessemer Processing Co.*, 155 N.J. 279, 301-302 (1998), the Court recognized the "formidable" difficulty in attributing direct liability to individualized defendants where the victims injuries arose over many decades from repetitive and multiple exposures. *Bessemer* at 301-302. Due to "the *unique* difficulties faced by a plaintiff attempting to establish causation in the toxic-tort context", *Id.* [emphasis added], the courts have accepted that circumstantial evidence may be used to establish liability of a group of collective tortfeasors." *See*, *e.g.*, *Bessemer* at 301 *citing Sholtis v. American Cyanamid Co.*, 238 N.J. Super. 8, 29; 568 A.2d 1196 (App. Div. 1990). Indeed, the asbestos cases and a host of other product liability cases have paved the way for the application of equitable principles to enable remedies in the absence of existing standards of liability. In *Sholtis*, the court recognized that the absence of "definitive standards" defining liability was no barrier to remand. *Sholtis* at 30.

As in the case of other mass torts where the defendants act in concert to distribute an anonymous source of injury,

the acts of defendants in financing slavery enabled the institution of slavery to function as an economic enterprise, causing harm to the persons enslaved through such purchases without knowledge of the tortfeasor's identify to the slave, with defendant contributing individually to the collective strength of the market in human beings. For Judge Posner to suggest proof of a direct link between the defendants and plaintiffs ancestors as a condition predicate to standing is to display a certain historical blindness to the true nature of slave financing in which the slave was kept ignorant of the parties financing his enslavement but was nevertheless grievously injured by tortfeasors that to the slave remain anonymous. This situation does not differ materially from the asbestosis or Agent Orange litigations in which products sold as a commodity causes injury to plaintiffs as to whom the manufacturer remains forever unknown. *See e.g.*, *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 833 (S.D.N.Y. 1984). As the federal courts have recognized, to impose direct causation as a predicate to standing in such cases would affect massive injustice, freeing the defendants of responsibility for undisputed liability.

Rather than simply dismiss the action because of its relative novelty, the District Court should have *first* sought to discern those standards that could be applied to this action of first impression, i.e., the disgorgement of wrongfully obtained profits from slave trading, financing and insuring. *Sholtis*, *supra*. Surely, this action presents "the unique difficulties faced by a plaintiff attempting to establish causation", *Bessemer* at 301-302, that requires the court to go beyond rigid rules of law and create equitable standards to enable the action to go forward.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED DECEMBER 13, 2006

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 05-3265, 05-3266, 05-3305

IN RE:

AFRICAN-AMERICAN SLAVE DESCENDANTS LITIGATION

APPEALS OF:

DEADRIA FARMER-PAELLMANN, *et al.*, and
TIMOTHY HURDLE, *et al.*

Appeals from the United States District Court
for the Northern District of Illinois, Eastern District.
No. 02 C 7764—**Charles R. Norgle, Sr.**, *Judge*

ARGUED SEPTEMBER 27, 2006—
DECIDED DECEMBER 13, 2006.

Before EASTERBROOK, *Chief Judge*, and POSNER and MANION, *Circuit Judges*.

POSNER, *Circuit Judge*. Nine suits were filed in federal district courts around the country seeking monetary relief under both federal and state law for harms stemming from the enslavement of black people in America. A tenth suit, by the Hurdle group of plaintiffs, makes similar claims but was

filed in a state court and then removed by the defendants to a federal district court. The Multidistrict Litigation Panel consolidated all the suits in the district court in Chicago for pretrial proceedings. 28 U.S.C. § 1407. Once there, the plaintiffs (all but the Hurdle plaintiffs, about whom more shortly) filed a consolidated complaint, and since venue in Chicago was proper and in any event not objected to by the parties (other than the Hurdle group, whose objection we consider later in the opinion), the district court was unquestionably authorized, notwithstanding *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998), to determine the merits of the suit. *In re Carbon Dioxide Industry Antitrust Litigation*, 229 F.3d 1321, 1325-27 (11th Cir.2000); cf. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-68, 60 S.Ct. 153, 84 L.Ed. 167 (1939).

We are also persuaded that a district court to which a case is transferred under section 1407 can rule on a motion to dismiss the case even if the plaintiff has not agreed to let the court decide the merits. *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1230-31 (9th Cir.2006); 15 Charles W. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3866 (2006). While it is true that the Supreme Court held in the *Lexecon* case that a transfer under section 1407 does not authorize the district court to retain the case for trial, the Court left open the question whether pretrial proceedings, which *are* the business (the exclusive business) of the transferee court, include rulings on dispositive pretrial motions, such as motions to dismiss. But the Court hinted that they do include them. Section 1407(a) states that "each action so transferred

[by the multidistrict litigation panel] shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." Concerning this "provision of § 1407(a) limiting the Panel's remand obligation to cases not 'previously terminated' during the pretrial period," the Court remarked that "this exception to the Panel's remand obligation indicates that the Panel is not meant to issue ceremonial remand orders in cases *already* concluded by summary judgment, say, or dismissal," 523 U.S. at 37, 118 S.Ct. 956 (emphasis added)-implying that the transferee court can indeed decide the entire case at the pretrial stage.

And rightly so. The duty to conduct the pretrial proceedings in a multidistrict litigation entails the transferee court's ruling on a host of pretrial motions, many of which, whether or not formally dispositive, can shape the litigation decisively. There is no reason to exclude from the court's authority rulings on motions to dismiss-especially a motion to dismiss on the ground that there is no federal jurisdiction. It would be odd to require a court to transfer a case to another federal court when it was apparent that neither court had jurisdiction over the case.

Were it not for the Hurdle suit, we wouldn't have to decide whether the district judge could have dismissed the transferred suits had the parties not agreed, by filing a new complaint, to his retaining them after completion of pretrial proceedings. But the Hurdle plaintiffs did not agree, so we cannot duck the question.

Appendix A

The suits are a series of mostly identical class actions on behalf of all Americans descended from slaves with whom one or more of the defendants or their corporate predecessors may have been directly or indirectly involved. The consolidated complaint (the Hurdle complaint is similar, so need not be discussed separately) alleges the following facts, for which we do not vouch, but merely summarize, the complaint having been dismissed before the truth or falsity of the allegations was determined.

The defendants are companies or the successors to companies that provided services, such as transportation, finance, and insurance, to slaveowners. At least two of the defendants *were* slaveowners; the predecessor of one of the bank defendants once accepted 13,000 slaves as collateral on loans and ended up owning 1,250 of them when the borrowers defaulted, and the predecessor of another defendant ended up owning 346 slaves, also as a consequence of a borrower's default. Even before the Thirteenth Amendment, slavery was illegal in the northern states, and the complaint charges that the defendants were violating the laws of those states in transacting with slaveowners. It also claims that there were occasional enslavements long after the passage of the Thirteenth Amendment and that some of the defendants were complicit in those too. By way of relief, the complaint seeks disgorgement to the class members of the profits that the defendants obtained from their dealings with slaveowners.

The legal basis for the plaintiffs' federal claim is 42 U.S.C. § 1982, which provides that "all citizens of the United States shall have the same right, in every State and

Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." See *City of Memphis v. Greene*, 451 U.S. 100, 119-20, 101 S.Ct. 1584, 67 L.Ed.2d 769 (1981); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). A claim based on a federal statute invokes the federal-question jurisdiction of the federal courts. But since most of the conduct of which the plaintiffs complain occurred prior to the passage of the Thirteenth Amendment, and indeed prior to the Civil War, section 1982 does not provide a sturdy basis for the retention of federal jurisdiction over the plaintiffs' nonfederal claims. A frivolous federal law claim cannot successfully invoke federal jurisdiction. *Hagans v. Lavine*, 415 U.S. 528, 536-37, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1317 (7th Cir.1997); *Crowley Cutlery Co. v. United States*, 849 F.2d 273, 276-77 (7th Cir.1988); *Lovern v. Edwards*, 190 F.3d 648, 654-55 (4th Cir.1999). So it cannot provide a perch on which to seat nonfederal claims in the name of the federal courts' supplemental jurisdiction, 28 U.S.C. § 1367. And very few of the plaintiffs *have* a nonfrivolous claim under section 1982.

But with one exception, all the nonfederal claims are within the federal diversity jurisdiction and so do not require a federal-law handle. The exception is Richard E. Barber, Sr.'s suit; for both he and Brown Brothers, one of the defendants in his suit, are citizens of New Jersey. Since he thus cannot invoke diversity as a basis for federal jurisdiction and does not have a colorable section 1982 claim (in fact he makes no section 1982 claim at all), his suit must be dismissed for want of federal jurisdiction without regard to

the other challenges that the defendants mount to federal jurisdiction over these suits.

The district judge ruled that by virtue of both the political-question doctrine and the requirement of standing to sue derived from Article III of the Constitution, there was no federal jurisdiction over any of the suits and that in any event they had no merit because the applicable statutes of limitations had lapsed and anyway the complaint failed to state a claim. 375 F.Supp.2d 721 (N.D.Ill.2005). The dismissal was with prejudice. But if the judge was correct that there is no jurisdiction, he should have dismissed the suits without prejudice and thus not decided their merits.

The political-question doctrine bars the federal courts from adjudicating disputes that the Constitution has been interpreted to entrust to other branches of the federal government. The earliest and still the best example is *Luther v. Borden*, 48 U.S. (7 How.) 1, 12 L.Ed. 581 (1849). Rhode Island had not adopted a new constitution after the break with England, but instead continued to govern itself under its colonial charter. Restive citizens convened a constitutional convention not authorized by the charter. The convention adopted a new constitution to which the charter government refused to submit, precipitating rebellion and the establishment in 1842 of a rival state government. The Supreme Court refused to decide which of the two competing governments was the legitimate one. It would have been exceedingly difficult to gather and assess, by the methods of litigation, the facts needed for such a decision. *Id.* at 41-42. It would have been even more difficult to formulate a legal concept of revolutionary legitimacy to guide the decision.

Formulating and enforcing a remedy would have presented additional stumbling blocks. The case simply exceeded judicial capabilities. So the Court left the matter to the President, to whom Congress had delegated the duty of resolving it. *Id.* at 43; see also *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74, 79-80, 50 S.Ct. 228, 74 L.Ed. 710 (1930); *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 133-50, 32 S.Ct. 224, 56 L.Ed. 377 (1912).

A case that sought reparations for the wrong of slavery would encounter similar obstacles, but the plaintiffs have been careful to cast the litigation as a quest for conventional legal relief. All they are asking the federal judiciary to do is to apply state law (plus the one federal statute, 42 U.S.C. § 1982) to the defendants' conduct. They face, of course, formidable obstacles, quite apart from the severely limited applicability of section 1982. To name just one of those obstacles, it is highly unlikely that antebellum laws in northern states were intended to confer financial or other benefits on the twenty-first century descendants of slaves. But the obstacles to the vindication of the plaintiffs' legal claims have the form at least of conventional defenses to a lawsuit. If one or more of the defendants violated a state law by transporting slaves in 1850, and the plaintiffs can establish standing to sue, prove the violation despite its antiquity, establish that the law was intended to provide a remedy (either directly or by providing the basis for a common law action for conspiracy, conversion, or restitution) to lawfully enslaved persons or their descendants, identify their ancestors, quantify damages incurred, and persuade the court to toll the statute of limitations, there would be no further obstacle to the grant of relief.

But we think that the district court was correct, with some exceptions to be noted, in ruling that the plaintiffs lack standing to sue. It would be impossible by the methods of litigation to connect the defendants' alleged misconduct with the financial and emotional harm that the plaintiffs claim to have suffered as a result of that conduct. See generally James R. Hackney, Jr., "The Jurisprudence of Slavery Reparations: Ideological Conflict, African American Reparations, Tort Causation, and the Case for Social Welfare Transformation," 84 *B.U.L.Rev.* 1193 (2004). For example, Aetna is alleged to have written several insurance policies on slaves in the 1850s in violation of state law applicable to the company, and to have obtained premiums from the insureds-the slaveowners-that (we'll assume) exceeded the cost of the insurance to Aetna (its expenses plus the payment of proceeds if the insured event came to pass). The plaintiffs argue that Aetna's net income from this insurance was a wrongful profit that the company should be ordered to restore to the plaintiff classes.

If the insurance business was competitive back then (and the plaintiffs do not argue that it was not), Aetna did not profit in an economic sense from the transactions of which the plaintiffs complain (its "profit" would just be its cost of equity capital), and in any event it would have distributed any profits from the transactions to its shareholders long ago. All that to one side, there is a fatal disconnect between the victims and the plaintiffs. When a person is wronged he can seek redress, and if he wins, his descendants may benefit, but the wrong to the ancestor is not a wrong to the descendants. For if it were, then (problems of proof to one side) statutes of limitations would be toothless. A person

whose ancestor had been wronged a thousand years ago could sue on the ground that it was a continuing wrong and he is one of the victims.

The plaintiffs introduce another claim of injury by asserting that had the defendants refused to violate their own states' laws by doing business with slaveowners, there would have been less slavery because the refusal would have been tantamount to subjecting the slaveowners to a partial boycott. That would have raised their costs, and, by making slavery less profitable, might have reduced the amount of it. ("Might," not "would," because the higher costs might simply have depressed the price of a slave.) And had there been less slavery, the argument continues, some of the ancestors of the members of the plaintiff classes would not have been slaves, but instead free laborers, and they would have had some disposable income part of which they might have saved rather than spent, and left to their heirs.

But this causal chain is too long and has too many weak links for a court to be able to find that the defendants' conduct harmed the plaintiffs at all, let alone in an amount that could be estimated without the wildest speculation. It is impossible to determine how much, if any, less slavery there would have been had the defendants not done business with slaveowners, what effect a diminution of slavery would have had on bequests by ancestors of the class members, and how much of the value of those bequests would have trickled down to the class members.

Suppose a class member could prove that he was descended from one of the slaves insured by Aetna or

transported by the Union Pacific Railroad (another defendant) or bought with money lent to the buyer by the predecessor of the JPMorgan Chase Bank (still another defendant), and that these transactions were illegal and that the descendants of slaves are among the people whom the laws were intended to protect. Had he not been insured or transported or bought with a bank loan, how would the financial welfare of his remote descendant be affected? Would the ancestor have been freed, or perhaps never enslaved in the first place? As the plaintiffs stress, slavery was profitable; is it conceivable that slaveholders would have been unable to insure, transport, and finance the purchase of slaves if northern companies had been excluded from the provision of these services or had refused to violate their states' laws that sought to keep them from providing the services?

Even if compliance with those laws would have curtailed slavery and even if it could be shown (it could not be) that as a result of that hypothetical curtailment a plaintiff's remote ancestor would not have been a slave but instead a free laborer, how could the wages that the ancestor would have earned as a free laborer be shown to have influenced the wealth of his remote descendant? Economists actually study such issues, under the rubric of "intergenerational mobility," see, e.g., Kerwin Kofi Charles & Erik Hurst, "The Correlation of Wealth Across Generations," 111 *J. Pol. Econ.* 1155 (2003); Keith N. Hylton, "The Jurisprudence of Slavery Reparations: Slavery and Tort Law," 84 *B.U.L.Rev.* 1209, 1239-41 (2004), but these are studies of aggregate effects, not of the effects of particular acts, affecting particular individuals, on the wealth of specific remote descendants. There is no way to determine that a given black American

today is worse off by a specific, calculatable sum of money (or monetized emotional harm) as a result of the conduct of one or more of the defendants.

Nor are the problems of measuring and tracing elided by recasting the relief sought as restitution rather than damages. Restitution-the transfer of the wrongdoer's gain to his victim-is an alternative to damages, the monetization of the victim's loss. *ConFold Pacific, Inc. v. Polaris Industries, Inc.*, 433 F.3d 952, 957-58 (7th Cir.2006); *Charter Communications Entertainment I, DST v. Burdulis*, 460 F.3d 168, 182 (1st Cir.2006); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 944 (8th Cir.1999); 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 4. 1, pp. 551, 555 (2d ed.1993). It is a sensible remedy for egregious misconduct because it makes the conduct worthless to the defendant by taking away his profit even if it exceeds the loss to the plaintiff. But it presupposes an injury-it is a remedy for a legal wrong-and there is no way in which to determine what if any injury the defendants inflicted on the members of the plaintiff classes.

And again, if there were a legal wrong, it would not be a wrong to any living persons unless they were somehow the authorized representatives to bring suits on behalf of their enslaved ancestors. With some exceptions to be noted, the plaintiffs are suing to redress harms to third parties (their ancestors), without being authorized to sue on behalf of those parties. It is like a suit by a descendant of a Union soldier, killed in battle, against a Civil War era gun manufacturer still in business that sold guns to the Confederacy in violation of federal law. A federal court could not entertain the suit because the plaintiff would be unable to prove a harm to an

interest of his (such as his bank account) that the law protects. E.g., *Raines v. Byrd*, 521 U.S. 811, 818-19, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997); *Sierra Club v. Morton*, 405 U.S. 727, 739-40, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). It is possible that had the ancestor not died when he did he would have become a wealthy person and left bequests so immense that his remote descendant, the plaintiff, would have inherited more money from his parents or grandparents than he actually did. But that is too speculative an inquiry to provide a basis for a federal suit. See *McConnell v. FEC*, 540 U.S. 93, 225-26, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003); *Branton v. FCC*, 993 F.2d 906, 909 (D.C.Cir.1993).

The two cases just cited, and others, treat remoteness as a limitation on Article III standing. Still other cases treat it as a nonjurisdictional limitation on who may sue in federal court-but still a limitation. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-69, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-77, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982); *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir.1995); *Allegheny General Hospital v. Philip Morris, Inc.*, 228 F.3d 429, 435 (3d Cir.2000). Another group of cases would deem the suit barred by Article III because one function of the Article III standing doctrine is to prevent parties with slight interests in a litigation from crowding those who have the main interests. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); *Morlan v. Universal Guaranty Life Insurance Co.*, 298 F.3d 609, 621 (7th Cir.2002); *Illinois Department of Transportation v. Hinson*,

122 F.3d 370, 373 (7th Cir.1997); *People Organized for Welfare & Employment Rights (P.O.W. E.R.) v. Thompson*, 727 F.2d 167, 173 (7th Cir.1984); *Abraham v. Intermountain Health Care Inc.*, 461 F.3d 1249, 1268 (10th Cir.2006). In our hypothetical case of the Union soldier, the litigant with the paramount interest in the case would be his estate and the damages that the estate could recover would include whatever amount of money he would have wanted his descendant to inherit. If the descendant could sue the tortfeasor directly for that amount (or for the tortfeasor's profit, in a suit for restitution), there would be either double recovery or an impossible task of allocating the monetary recovery between the descendant and the estate.

A few of the plaintiff's claims, however, as we noted at the outset, are claims of subjection to involuntary servitude after it was outlawed by the Thirteenth Amendment, and indeed into the twentieth century. Cain Wall, Sr. claims that "during the time that [he] was enslaved"-which he contends extended into the 1960s—"one or more of the defendants were doing business in Mississippi or Louisiana. Some of the defendants had reason to know of the enslavement of Cain Wall and yet failed to take steps to eliminate same, while they continued to inure benefits from the illegal, but sanctioned system of servitude post-emancipation." But there is no claim that the defendants subjected Wall (or any other class member) to involuntary servitude or did anything to perpetuate or exacerbate his condition. The claim is that they took no steps to free him. The briefs suggest no basis for thinking that there is any kind of Good Samaritan legal duty to eliminate a violation of the Thirteenth Amendment committed by someone else.

Appendix A

The limitations that Article III places on the right to sue in a federal court require us to affirm (though striking "with prejudice"), on the basis of lack of standing, the greater part of the district court's judgment. But there are three qualifications. First, although most of the plaintiffs and class members are suing as descendants rather than as representatives of their ancestors' estates authorized to sue on those ancestors' behalf, a few do claim to be suing in such a representative capacity. It is highly unlikely that the estate of anyone who died a century or more ago, or indeed more than half a century ago (for although many former slaves survived into the twentieth century, very few would still have been alive 50 years ago, which is to say in 1956, 91 years after the end of the Civil War), has not yet been closed. But the district judge accepted that the purported representatives had a right to sue on behalf of their ancestors, and the defendants offer only a perfunctory rebuttal. We shall assume without deciding that some of the plaintiffs are legal representatives of their slave ancestors. These plaintiffs not only escape the objection to standing that the suits seek damages for injuries actually suffered by third parties (the ancestors-no longer third parties, but the real parties in interest, merely represented by the plaintiffs), but have less to prove. They just have to prove the injury to the ancestors; the trickle-down question is elided.

In all likelihood it would still be impossible for them to prove injury, requiring as that would connecting the particular slavery transactions in which the defendants were involved to harm to particular slaves. But in any event, suits complaining about injuries that occurred more than a century and a half ago have been barred for a long time by the

applicable state statutes of limitations. It is true that tolling doctrines can extend the time to sue well beyond the period of limitations-but not to a century and more beyond. Slaves could not sue, and even after the Thirteenth Amendment became effective in 1865 suits such as these, if brought in the South, would not have received a fair hearing. However, some northern courts would have been receptive to such suits, and since the defendants are (and were) northern companies, venue would have been proper in those states. Even in the South, descendants of slaves have had decades of effective access to the courts to seek redress for the wrongs of which they complain. And it's not as if it had been a deep mystery that corporations were involved in the operation of the slave system. See, e.g., Edgar J. McManus, *Black Bondage in the North* 174 (1973); Kenneth M. Stampp, *The Peculiar Institution: Slavery in the AnteBellum South* 397 (1956).

The second qualification concerns a claim, rather buried in the complaint but not forfeited, that in violation of state fraud or consumer protection law members of the plaintiff classes have bought products or services from some of the defendants that they would not have bought had the defendants not concealed their involvement in slavery. This claim has nothing to do with ancient violations and indeed would be unaffected if the defendants' dealings with slaveowners had been entirely legal. It is a complaint of consumers' being deceived because sellers have concealed a material fact. The injury is the loss incurred by buying something that one wouldn't have bought had one known the truth about the product.

It is true that under no consumer protection law known to us, whether a special statute or a doctrine of the common law of contracts or torts, has a seller a general duty to disclose every discreditable fact about himself that might if disclosed deflect a buyer. To fulfill such a duty he would have to know much more about his consumers than he possibly could. But the plaintiffs are charging the defendants with misrepresenting their activities in relation to slavery. A seller who learns that some class of buyers would not buy his product if they knew it contained some component that he would normally have no duty to disclose, but fearing to lose those buyers falsely represents that the product does not contain the component, is guilty of fraud. An example would be a manufacturer who represented that his products were made in the United States by companies that employ only union labor, whereas in fact they were made in Third World sweatshops. See *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 119 Cal.Rptr.2d 296, 45 P.3d 243, 248 (Cal.2003); *Price v. Philip Morris, Inc.*, 219 Ill.2d 182, 302 Ill.Dec. 1, 848 N.E.2d 1, 19 (Ill.2005); *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134, 267 Ill.Dec. 14, 776 N.E.2d 151, 154-55 (Ill.2002); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1185 (3d Cir.1993).

We do not offer an opinion on the merits of the consumer protection claims, but merely reject the district court's ruling that they are barred at the threshold.

The third qualification concerns the Hurdle suit and is related to the second qualification. Unlike the other plaintiffs, the Hurdle plaintiffs didn't want to remain in the district court in Chicago. They wanted to return to the California district court from which their case had been transferred to Chicago for pretrial proceedings, when the pretrial proceedings

concluded. Actually they wanted to return to the California *state* court from which the defendants had removed their case to the district court, but that is an issue for that district court to resolve if and when the case is returned. As we pointed out at the beginning of this opinion, the district court, as the transferee court in a transfer pursuant to 28 U.S.C. § 1407, was authorized to rule on a motion to dismiss the Hurdle suit. But though the district judge in the exercise of that power rightly dismissed so much of that suit as attacks wrongs done to the plaintiffs' ancestors, the Hurdle plaintiffs are among the plaintiffs who have consumer protection claims as well. As to them there will be further pretrial proceedings, and they will be conducted in Chicago. So the Hurdle plaintiffs can't go back to California, at least not yet.

To summarize, the district court's dismissal, for want of standing, of all but the claims brought by legal representatives of slaves plus the consumer protection claims is modified to be a dismissal without prejudice, and as so modified is affirmed. (Barber's suit is dismissed, also without prejudice, for want of diversity.) The dismissal of the claims brought by the plaintiffs who claim to be legal representatives is affirmed, but on the merits (statute of limitations) and so with prejudice. The dismissal of the consumer protection claims is reversed and the case remanded to the district court for further proceedings on those claims consistent with this opinion. The district court is authorized to retain those claims for the duration of the litigation, except in the case of the Hurdle plaintiffs, as to whom the court is authorized only to conduct pretrial proceedings under 28 U.S.C. § 1407.

Appendix A

MODIFIED AND AFFIRMED, IN PART;
REVERSED IN PART AND REMANDED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JULY 6, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

MDL No. 1491

Lead Case No. 02 C 7764

IN RE AFRICAN-AMERICAN SLAVE DESCENDANTS LITIGATION

OPINION AND ORDER

CHARLES R. NORGLE, District Judge

Before the court is Defendants' Joint Motion to Dismiss Plaintiffs' Second Consolidated and Amended Complaint. For the following reasons, the motion is granted with prejudice.

I. INTRODUCTION

This case arises out of the institution of human chattel slavery as it existed in the North American colonies and the later formed United States of America. The allegations in Plaintiffs' Second Consolidated and Amended Complaint ("SCAC" or "Complaint") retell the generally acknowledged horrors of the institution of slavery, and the malignant actions of the sovereigns, entities, and individuals, foreign and

domestic, that supported that institution. Plaintiffs' Complaint asks the courts to reexamine a tragic period in our Nation's history and to hold various corporate defendants liable for the commercial activities of their alleged predecessors before, during, and after the Civil War in America. Defendants acknowledge that slavery marked a deplorable period in our Nation's history. However, they assert that Plaintiffs' claims, which arise from that period, cannot be heard in 2005 in a court of law.

II. HISTORICAL OVERVIEW OF SLAVERY IN AMERICA

In essence, Plaintiffs' Complaint is a claim for reparations rooted in the historic injustices and the immorality of the institution of human chattel slavery in the United States. To elucidate the nature of this institution, the court undertakes an analysis, necessarily brief, of the historical events surrounding slavery, including the monumental event that ended the institution of slavery in the United States, the Civil War. The court also undertakes a brief analysis of the present day slave reparations movement, in order to illuminate the larger political context into which this case falls.

A. A Definition of Slavery

In January of 1865, General William Tecumseh Sherman of the Union forces, along with Secretary of War Edwin Stanton, met with former slaves. Ira Berlin, *Generations of Captivity: A History of African-American Slaves* 2 (2003). The conversation focused on two questions: from the point

of view of the freed slave, what was the nature of slavery, and what was the nature of freedom? *Id.* Garrison Frazier, a sixty-seven year old former slave, explained that "[s]lavery . . . is receiving by the *irresistible power* the work of another man, and not by his *consent.*" *Id.* Freedom, Frazier indicated, "is taking us from the yoke of bondage, and placing us where we could reap the fruits of our own labor, take care of ourselves and assist the Government in maintaining our freedom." *Id.* Frazier's definition reminds us of the essential unfairness of slavery: the slaveowner takes, by sheer violence and force, the slave's freedom and labor in order to place himself at the top of a society's economic hierarchy. *Id.* at 3.

B. A Brief History of Slavery in the New World

While slavery seems to have been a part of human history since the "dawn of civilization," African slave trafficking in the New World began in the year 1502. Robert William Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery* 17-18 (1991). Europeans were historically drawn to Africa for two reasons: gold and slaves. Edward Reynolds, *Stand the Storm, A History of the Atlantic Slave Trade* 28 (1985). Those who journeyed to Africa seeking slaves for the New World sometimes simply kidnapped individuals who appeared before them by happenstance. Herbert S. Klein, *The Atlantic Slave Trade* 103 (1999). However, historical evidence indicates that a great deal (perhaps even the majority) of the slave trade was made possible by African leaders who sold African slaves to European slave traders. *Id.; see also* Reynolds, *supra* at 33-46 (providing a detailed explanation of the African slave market, and the economic mechanisms used to facilitate the sale of slaves from local

African chiefs to slave traders). Local African leaders acquired these slaves in several different ways: captives were taken in local wars or raids, those imprisoned for crimes or indebtedness were often forced into slavery, and large states would exact slaves as "tribute" from smaller tribes under their control. *See Klein*, *supra* at 117.

Upon their sale to slave traders, slaves were shipped to the New World in what became known as the "Middle Passage." Slaves' heads were shaved, their bodies were branded and stripped naked, and their ankles were shackled. *See* Reynolds, *supra* at 47. They were then led into the holds of slave ships, where they were laid down alongside each other for the journey to the New World. *Id.* at 48. The prevalence of disease, lack of sufficient food and water, and constant confinement took its toll, with up to one-quarter of the slaves on any given ship dying during the "Middle Passage." *Id.* at 48-53.

African slaves in the New World were initially sold into small sugar production operations in Brazil, Mexico, Peru, Cuba, Haiti, Jamaica, the British West Indies, and Dutch Guyana. *Id.* at 20-21. Other African slaves were set to work producing such crops as cocoa, coffee, hemp, tobacco, and rice. *Id.* at 21. By the 1680s, the small farm with its traditional methods of operation had given way to more efficient means of production, and the concept of the large "plantation" was born. *Id.* at 23. Inefficient methods of farming had been "replaced by large gangs of slaves, working in lock step, and moving methodically across vast fields." *Id.* With this change came an increase in the size of slave operations. By the early part of the 1800s, many plantations in Jamaica and the West Indies contained up to two hundred and fifty slaves. *Id.*

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Slavery in North America began more slowly than slavery in South America and the Caribbean. In 1680, there were 7,000 slaves in the British North American colonies. *Id.* at 29. Slavery as an economic institution in North America, however, rapidly gained momentum over the next fifty years. By the 1730s, roughly 120,000 slaves had been brought to the colonies and forced to work in such industries as farming, tobacco production, and domestic service. *Id.* By the middle of the 1700s, the institution of slavery in the United States began to concentrate in the Southern colonies. It was in these colonies that plantations emerged, ready to take advantage of the inexpensive labor slaves provided in the production of such crops as tobacco, rice, sugar, and cotton. *Id.* at 31.

During the years 1780 to 1810, the rapid expansion of these industries was accompanied by a significant increase in the number of slaves imported from Africa. *Id.* at 32. The increase in the importation of slaves, along with the natural increase in the slave population, soon gave the United States a dubious distinction. By 1825, the population of slaves in the United States was roughly 1,750,000, making the United States the "leading user of slave labor in the new world." *Id.* at 33. Slavery had become the dominant economic force in the Southern United States. Historians cite numerous factors for this development, but it seems that two factors are the most significant. First, slave labor was inexpensive compared to other sources of labor. *Id.* at 34. Second, slave masters in the Southern states were willing to expend an "enormous, almost unconstrained degree of force . . . to transform ancient modes of labor into a new industrial discipline." *Id.* This "new industrial discipline" was based on a division of labor scheme, enforced by brutality, and legally sanctioned.

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C. Slavery and American Law

This violent and oppressive system was supported by the United States legal system for a long period of time. Thus slavery was historically more than simply a social and economic institution. It was also an established legal institution.[1] For instance, Article I, Section 9 of the United States Constitution has been traditionally understood to limit Congress' power to regulate slavery.[2] It is thought that this Article meant that Congress was denied the power to regulate the "internal slave trade, leaving only importation from Africa to be prohibited after 1808." Walter Berns, *The Constitution and the Migration of Slaves*, 78 Yale L.J. 198 (1968). Also, in 1850, Congress passed a statute supporting the rights of slaveowners to capture escaped slaves. The Fugitive Slave Act provided that:

> [W]hen a person held to service or labor in any State or Territory of the United States, has heretofore or shall hereafter escape into another State or Territory of the United States, the person or persons to whom such service or labor may be due . . . may pursue and reclaim such fugitive person . . . [and may] take and remove such

1. Some Northern state statutes, however, stood firmly in opposition to slavery. *See infra* Part II.E (discussing the Personal Liberty Laws enacted in Northern States).

2. "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." U.S. Const. art I, § 9, cl. 1.

> fugitive person back to the State or Territory whence he or she may have escaped as aforesaid.

The Fugitive Slave Act, ch. 60, § 6, 9 Stat. 462 (1850). This Act also provided for fines and/or imprisonment for those who aided escaped slaves, and stipulated that both law enforcement personnel and ordinary citizens were bound by law to aid in the capture of escaped slaves. *Id.* Finally, in the infamous case of *Dred Scott v. Sandford*, Scott, a slave, brought suit to gain his freedom. 60 U.S. 393, 15 L.Ed. 691 (1856). The Supreme Court of the United States held that since Scott was a "negro, whose ancestors were imported into this country, and sold as slaves," he could not be a citizen of the United States, and hence had no standing to bring suit in a United States court. *Id.*, 60 U.S. at 403-04.

D. Slavery and Morality

The immorality of the institution of slavery is obvious. However, scholars have attempted to explain exactly what it is about this institution that offends moral sensibilities. Two moral indictments of the institution are significant. First, "slavery permitted one group of people to exercise unrestrained personal domination over another group of people." Fogel, *supra* at 394. The slave was subject to abject cruelty, both physical and psychological, by his or her masters in order for the master to maintain domination. *Id.* In one sense, "[t]he extreme degree of domination required by this system . . . is the essential crime." *Id.* Second, the slave was denied the fruits of his or her labor. *Id.* at 395. Slaves were forced to work at physically grueling tasks for very long hours without pay, thus it was impossible for the slave to improve

his or her economic position within society. *Id.* The slave simply had no resources or "opportunity . . . to rise on the economic ladder by acquiring land, labor skills, and other forms of capital." *Id.*

E. Slavery as a Cause of the Civil War

Historians have long debated whether slavery was the single driving force behind the regional tensions in the United States that eventually led to the Civil War. "Although some scholars have held that slavery was *the* cause [of the Civil War], others have developed complex analyses that draw distinctions between immediate and ultimate causes and that explore a variety of ways other than war that could have settled or at least contained the issue of slavery." *Id.* at 411. This much, however, is clear: by 1861, tensions between the North and the South had escalated to the extent that maintaining peace would have required that the Northern states allow the permanent "existence of an independent confederacy dedicated to the promotion of slavery." *Id.* at 413. In other words, by 1861, tensions between the North and the South had increased to such a pitch that the only way slavery would be abolished throughout the entire nation was through armed conflict.

A great deal of the tension between the North and the South had to do with the Northern states' promulgation of Personal Liberty Laws. "In his annual message to Congress of December 3, 1860, [President] James Buchanan warned that the South 'would be justified in revolutionary resistance to the Government of the Union' if northern states did not repeal their Personal Liberty Laws." Thomas D. Morris, *Free*

Men All: The Personal Liberty Laws of the North 1780-1861 202 (1974). These laws were devised and implemented by many Northern states to make it very difficult for slave owners to capture escaped slaves who had taken up residence in those states.

The court does not claim objective knowledge of the ultimate cause of the Civil War. Certainly, however, tensions marked by the North's moral outrage at the institution of chattel slavery, and the South's indignation at the North's promulgation of Personal Liberty Laws, contributed significantly to the advent of war.

F. The Civil War

Fort Sumter, located in the Charleston harbor, South Carolina, was one of just four Federal fortifications left in Confederate territory in 1861. Shelby Foote, *The Civil War, A Narrative: Fort Sumter to Perryville* 44 (Vintage Books 1986) (1958). The government of South Carolina had made protests to Washington regarding the presence of a Federal fortification within its borders, but those protests were ignored. *Id.* Instead, Washington decided to reinforce Fort Sumter with men and supplies. *Id.* However, when local gunmen opened fire on a Union steamer attempting to bring these reinforcements to Fort Sumter, the steamer was forced to turn away. *Id.* By March of 1861, Fort Sumter was surrounded by Confederate forces, and was cut off from fresh supplies. *Id.* By April of that year, the Federal forces inside Fort Sumter were in danger of starving to death. *Id.* at 48. The time had come for Washington to make a decision—abandon Fort Sumter, or again attempt to resupply it.

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Washington was aware that another attempt to bring supplies to Fort Sumter might well provoke an attack on the fort itself. *Id.* at 47. This time, however, the attack would not come from local gunmen, but from Confederate forces. *Id.* Washington decided not to cave in to Confederate pressures, and attempted to bring fresh provisions and reinforcements to the fort. *Id.* at 47. On the morning of April 12, 1861, with Union supply ships within sight of Fort Sumter, the Confederacy fired the first shot of the Civil War. *Id.* at 49.

The four-year Civil War was fought by means of a series of pitched battles, each one seemingly more horrific than the last. The first true battle of the war, the battle of Bull Run, resulted in the deaths of roughly 2,700 Union soldiers and 2,000 Confederate soldiers. *The Price in Blood, Casualties in the Civil War, at* http://www.civilwarhome.com/casualties.htm. Other battles, at places like Gettysburg, Antietam, Fredericksburg, Wilson's Creek, Spotslyvania, Cold Harbor, and Franklin took the lives of tens of thousands of Union and Confederate soldiers. *Id.* The final campaign of the war, fought in the vicinity of Appomattox, Virginia, resulted in a combined 17,500 battle deaths. *Id.*

Following the Appomattox campaign, on April 9, 1865, Union General Ulysses S. Grant received Confederate General Robert E. Lee at Appomattox Courthouse, where the two generals agreed upon the terms of Lee's surrender. Shelby Foote, *The Civil War, A Narrative: Red River to Appomattox* 945-51 (Vintage Books 1986) (1974). Shortly thereafter, Grant rode out towards his headquarters, where Union batteries were firing in celebration. *Id.* at 950-51. Grant insisted the batteries stop firing, worried that the noise might

spark a skirmish between his troops and the nearby, and still armed, Confederate soldiers. *Id.* at 951. There was, however, another more important reason Grant considered it "unfitting" for his troops to be firing their weapons at that point: " 'The war is over,' he told his staff. 'The rebels are our countrymen again.' " *Id.*

All in all, approximately 620,000 Americans died in the Civil War; Union forces fighting to end slavery suffered 360,000 of these deaths. James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 854 (Oxford University Press 1988). There were 178,975 African-American Union troops that fought in the Civil War, and 36,000 of those troops died during the war. *The Price in Blood, Casualties in the Civil War, at* http:// www.civilwarhome.com/casualties.htm. An analysis as brief as this cannot do justice to the tremendous sacrifices made by both Union and Confederate soldiers in this war. Since the Civil War, America has been involved in a number of armed conflicts, but, by some estimates, the fatalities America suffered in the Civil War exceeds the total number of fatalities America has suffered in all its other wars. *Id.* The Civil War, the war that ended the institution of chattel slavery in the United States, was truly America's bloodiest war.

G. The Abolishment of Slavery

On January 1, 1863, in the midst of the Civil War, President Abraham Lincoln issued the Emancipation Proclamation. That document reads in part: "I do order and declare that all persons held as slaves within said designated States . . . are, and henceforward shall be free. . . ." Abraham

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Lincoln, The Emancipation Proclamation, Exec. Proclamation No. 17 (Jan. 1, 1863), reprinted in 12 Stat. 1268 (1863).

Following the war, Congress acted to formally abolish slavery by proposing the Thirteenth Amendment to the United States Constitution. That Amendment was ratified on December 6, 1865. Section 1 of that Amendment reads: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1.

Also, the Fourteenth Amendment to the United States Constitution was ratified on July 9, 1868. Section 1 of that Amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1. In effect, the Fourteenth Amendment overruled the *Dred Scott* decision, making freed slaves citizens of the United States.

Following the Civil War, the South was bankrupt, and an estimated four million African-Americans assumed the responsibilities of freedom as nationalism emerged. These lingering effects led to the Reconstruction era, a significant period in our Nation's history, which addressed the numerous issues raised by the abolition of slavery and the war fought to achieve that end.

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H. The Modern Slave Reparations Movement

Plaintiffs' Second Consolidated and Amended Complaint falls within the broader context of a present and ongoing social and political movement for slave reparations in America. In order to properly place this suit within the context of that movement, the court offers a brief analysis of recent efforts undertaken by various groups to gain reparations for the historic injustices of slavery.

1. A Definition of "Reparations"

A complete definition of the term "reparations" will answer, at least, the following questions. What political, moral, or legal justification is there for the assertion that descendants of slaves are owed some sort of reparations? What are the arguments against reparations? Assuming reparations are justified, what form should these reparations take? Which specific individuals or groups will pay these reparations? To which specific individuals or groups will these reparations be paid?

In general, reparations advocates argue that reparations are justified because America itself owes a debt to the descendants of slaves. America owes this debt, advocates assert, simply because the slaves themselves were never paid for their labor. "[B]lack people worked long, hard, killing days, years, centuries—and they were never *paid*. . . . There is a debt here." Randall Robinson, *The Debt: What America Owes to Blacks* 207 (2000). In other words, the basic moral principle of fairness, and the fundamental legal principle that parties must repay their debts, justifies reparations. "[B]elief

in the fairness of reparations requires at the intellectual level acceptance of the principle that the victims of unjust enrichment should be compensated. Under reparations, Blacks more readily may position themselves as creditors seeking payment of an overdue debt, rather than as racial supplicants seeking an undeserved preference." Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L.Rev. 429, 436 (1998).

Other advocates argue that reparations are justified as a way to "repair a country by creating a sense of mutual, interracial trust, respect, and shared destiny." Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 Harv. L.Rev.. 1689, 1689-90 (2002) (hereinafter, "Note"). Still others argue that reparations for descendants of slaves are justified because other groups that have suffered historical harms have been able to obtain reparations. *See* Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. Ann. Surv. Am. L.. 497, 499 (2003) (hereinafter " *Conceptual and Legal Problems* ") (noting that "Native Americans, Holocaust victims, [and] Japanese Americans interned during World War II" have obtained reparations).

However, opponents of slave reparations identify a number of reasons, they assert, that reparations are unjust or unwise. Alfred L. Brophy, *The Cultural War over Reparations for Slavery*, 53 DePaul L.Rev. 1181, 1201-02 (2004) (hereinafter " *Cultural War* "); *see also* David Horowitz, *Uncivil Wars: The Controversy over Reparations for Slavery* 12-16 (2002) (identifying ten separate arguments against

reparations). The court will briefly summarize what seem to be the most cogent of these arguments. Some assert that there is no genuine moral or legal liability on the part of those who are currently asked to pay the reparations. *Cultural War*, *supra*, at 1202-06. This argument focuses on the fundamental notion that "one should be liable only for the harms one causes. . . ." *Id.* at 1202. Since today's Americans do not hold slaves, the argument goes, today's Americans are not morally or legally liable for the evils of slavery. *Id.* Others argue that the reparations asked for have, in fact, already been paid.

> Since the passage of the Civil Rights Act and the advent of the Great Society in 1965, trillions of dollars in transfer payments have been made to African-Americans in the form of welfare benefits and racial preferences (in contracts, job placements and educational admissions). . . . It is said that reparations are necessary to achieve a healing between African-Americans and other Americans. If trillion-dollar restitutions and a wholesale rewriting of American law (in order to accommodate racial preferences) is not enough to achieve a "healing," what is?

Horowitz, *supra*, at 14; *see also* Chicago, Ill., Ordinance 2-92-420 et seq. (providing that "Minority-owned business[es]," including those businesses owned by African-Americans, are to receive at least twenty-five percent of the dollar value of any contract, purchase order, or agreement awarded by the City of Chicago). Some also argue that the Civil War itself was payment, in blood and human lives, for slavery. *Cultural War*, *supra*, at 1208; *see also* Horowitz,

supra, at 15 ("If not for the sacrifices of white soldiers and a white American president who gave his life to sign the Emancipation Proclamation, blacks in America would still be slaves"). Finally, a common argument made against reparations is that reparations talk is divisive, and continues to enmesh African-Americans in a culture of victimhood. *Cultural War*, *supra*, at 1209-10 ("[talk of reparations] makes blacks think that whites as a group are their oppressors; it makes whites who have no responsibility for the sins of the past feel like oppressors and plays on feelings of guilt").

Advocates of reparations differ in their assessments of exactly what form reparations ought to take. Some reparations advocates assert that reparations should start with a formal apology from America, as well as the establishment of "truth commissions" to investigate the complicity of various groups or organizations in slavery. *Cultural War*, *supra*, at 1185-1189; *see also* Chicago, Ill., Ordinance 2-92-585 (requiring parties entering into contracts with the city to search company records, and provide "full and accurate disclosure to the public about any slavery policies sold by any companies, or profits from slavery by other industries (or their predecessors) who are doing business with the city"); S. Res. 39, 109th Cong. (2005) (formally apologizing for the Senate's failure to enact anti-lynching legislation, and expressing sympathy to the descendants of victims of lynching). Apologies, "truth commissions," and local ordinances requiring companies to disclose ties to slavery, are thought by some to be a first step along the road to full reparations. "By preparing people to understand the nature of the harm and why reparations are needed, they are a way of making the claim before the public." *Cultural War*, *supra*, at 1188.

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Most commonly, however, the term "reparations" simply means some sort of financial compensation for descendants of slaves. Some reparations advocates have proposed that reparations take the form of a "trust . . . established for the benefit of all Black Americans." Westley, *supra*, at 470; *see also* Robinson, *supra*, at 244-45. This trust "should be financed by funds drawn annually from the general revenue of the United States," and the funds would "be expendable on any project or pursuit aimed at the educational and economic empowerment" of African-Americans. Westley, *supra*, at 470. Specifically, advocates of reparations assert that trust funds should be used to finance the creation of special schools for black children found to be "at risk in unhealthy family and neighborhood environments." Robinson, *supra*, at 244-45. These funds could also be used to finance the work of black political and advocacy groups. *Id.* at 245-46. Other reparations advocates propose that reparations take "the form of subsidies to black-owned businesses, investment in education programs and scholarships for black youths, training programs for black workers, affirmative action programs, resources for community-based organizations in predominantly black communities, and development and implementation of programs designed to educate the country about the legacy of slavery." Note, *supra*, at 1690.

The reparations movement has thus moved towards the notion that reparations should be directed towards certain groups of people, rather than specific individuals. "Pro-reparation positions more readily see harm to entire groups and want to repair that economic and psychological harm." *Conceptual and Legal Problems*, *supra*, at 509; *see also*

Robinson, *supra*, at 244-46 (advocating group reparations). The group entitled to receive reparations would obviously consist of descendants of slaves, and determining exactly who is and is not a member of this group could be done in a number of different ways. *See* Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 Geo. L.J. 2531, 2542 (2001) (proposing that genealogical research, blood testing, or genetic mapping could be used to determine whether one is a legitimate descendant of slaves).

However, there may well be no perfect method of determining exactly who is a descendant of a slave, and thus a member of the group entitled to receive reparations. *See id.* at 2542-2547. Genealogical research "often fails to provide significant information about a person's ancestry." *Id.* at 2543. The blood, or "one-drop," test (whereby anyone with any trace of African ancestry is deemed part of the group entitled to receive reparations) "fails to differentiate between descendants of U.S. slaves and those of other nationalities with African heritage. . . ." *Id.* at 2544. Genetic mapping, or DNA testing, is more promising than the above two methods, but "alone is insufficient to provide a decisive link to a homeland. . . ." *Id.* at 2547.

The question of who ought to pay the reparations is also complex. The value of slaves' unpaid labor, reparations advocates argue, was scattered amongst numerous entities: "plantation owners, northern entrepreneurs, state treasuries, the United States government." Robinson, *supra*, at 207. In the case presently before the court, the Plaintiffs have chosen to bring suit against private entities, the corporations who allegedly held slaves, and their successors in interest. For

example, the first named Defendant is FleetBoston Corporation, which Plaintiffs allege is a successor in interest to Providence Bank, which allegedly financed and profited from the slave trade. SCAC, ¶¶ 116-126. Many reparations advocates, however, focus their attention on the United States government as the proper party to pay reparations. *See* Note, *supra*, at 1700 ("Reparations are not intended to hold individual Americans living today morally responsible for the acts of their forefathers, but rather to insist that the country apologize for its wrongful acts and take the necessary steps to bridge the racial divide and to alleviate the economic and social disparities that resulted from those acts."); *see also* Hopkins, *supra*, at 2551-52 (advocating that the United States government pay these reparations).

The following general definition of slave "reparations" thus emerges. "[R]eparations mean truth commissions that document the history of racial crimes and the current liability for those crimes, apologies that acknowledge liability, and payments to settle the account." *Cultural War*, *supra*, at 1190. These payments may be made in the form of a trust, with the descendants of slaves named as trust beneficiaries, or other forms of subsidies given to the descendants, and could be made by private entities who have allegedly profited from slavery (as the plaintiffs in the instant suit urge). The reparations movement more commonly insists, however, that the United States government should make these payments. Reparations are justified, advocates argue, on several grounds, including that of an alleged moral and legal debt owed to descendants of slaves, and the historical precedents of reparations for the victims of other historical injustices. However, there are a number of cogent arguments against

reparations, including the arguments that present day Americans are not morally or legally liable for historical injustices, that the debt to African-Americans has already been paid, and that reparations talk is divisive, immersing African-Americans in a culture of victimhood.

2. Previous Attempts at Slave Reparations

Reparations advocates identify five different time periods during which reparations for slavery were seriously discussed in one form or another. *See* Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 Tul. L.Rev.. 597, 600 (1993). First, during and immediately after the Civil War, both Congress and President Lincoln attempted to confiscate property from former slaveowners, and to redistribute that land to former slaves. *Id.* at 600-01. These attempts ultimately failed in 1865, when President Johnson ordered that lands be returned to their "pre-Civil War owners." *Id.* at 602.

The second period of attempts at slave reparations, occurring near the turn of the century, included attempts to establish pension funds for former slaves. *Id.* at 602-03. The third attempt at reparations, occurring during World War II, was not a proposal to pay African-Americans a sum of money; the proposal was rather to "provid[e] for the migration and colonization of negroes to newly acquired territories." *Id.* at 603. The fourth period of attempts at reparations coincided with the civil rights movement of the 1960's. *Id.* Various black activists such as James Forman, Audley Moore, and Dr. Martin Luther King, Jr., demanded, or in some cases, hinted at, slave reparations for African-

Americans. *Id.* at 603-05. For example, in his celebrated "I Have a Dream" speech, Dr. King asserted that "America has given the Negro people a bad check, which has come back marked 'insufficient funds.' " *Id.* at 604.

Finally, the fifth, and current period of attempts at slave reparations began with the Civil Liberties Act of 1988. *Id.* at 605-06. This Act provided $20,000, and a formal apology from the United States government to Japanese-Americans who were interned during World War II. Pub.L. No. 100-383, 102 Stat. 903 (1988); *see also Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944) (upholding the constitutionality of military and executive orders issued during World War II which excluded individuals of Japanese descent from the West Coast, and provided for the detention of those individuals in "assembly or relocation centers"). Seizing on what appeared to be Congress' willingness to right the wrongs of history, reparations activists began their efforts anew. Numerous grassroots organizations formed to advocate slave reparations. Verdun, *supra*, at 606 nn. 26-27. In 1989, U.S. Representative John Conyers introduced a bill that would have established a commission to study the effects of slavery on present day African-Americans, and to study whether reparations would be appropriate. H.R. 3745, 101st Cong. (1989). The preamble to Conyers' proposed legislation stated that its intent was

> to acknowledge the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to examine the institution of slavery, subsequent de

> jure and de facto racial and economic discrimination against African Americans, and the impact of these forces on living African Americans, [and] to make recommendations to the Congress on appropriate remedies, and for other purposes.

Id. Conyers has introduced similar legislation to each Congress since 1989, but none of these bills has made it out of committee. *See, e.g.*, H.R. 40, 108th Cong. (2003), H.R. 40, 107th Cong. (2001).

3. The Legislature as the Proper Forum to Achieve Slave Reparations

Despite Representative Conyers' lack of success before Congress, some reparations activists today still assert that the legislature, rather than the courts, is the best forum in which to introduce their claims. *See*, Westley, *supra*, at 436 ("It is Congress, and perhaps the legislatures of the former slave states, that must be persuaded to enact reparations"); Note, *supra*, at 1704 ("There are concrete benefits of working in the legislative branch rather than the judicial branch"). Activists acknowledge that there are significant problems involved with bringing the issue of reparations for slavery before a court of law.

The specific problem with bringing this issue before a court is that courts are equipped for, and charged with the responsibility of, "dealing with claims by well-identified victims against well-identified wrongdoers. . . ." *See Conceptual and Legal Problems*, *supra*, at 502. Claims

asserting harms against groups of long dead victims, perpetrated by groups of long dead wrongdoers, are particularly difficult to bring in modern American courts of law. "First, the victims are making claims against people who are not themselves wrongdoers. Furthermore, that defendant class may not have any current benefit from the harm. . . . Often the perpetrators cannot be identified with specificity or are no longer alive." *Id.* at 503. For these reasons, plaintiffs in reparations suits will inevitably face the conceptual problems of standing and statutes of limitations. Westley, *supra*, at 435. However, reparations advocates who bring their claims before legislatures face no such problems. "[L]egislatures may hold hearings, make findings, and pass resolutions or laws on any matter affecting the public interest and within the scope of constitutional power. Substantively, legislatures provide a friendlier forum than courts for racial remedies." *Id.*

In addition to reparations offered to Japanese individuals interred during World War II, at least one state legislature has passed a bill authorizing reparations for past racial injustices. *See* C. Jeanne Bassett, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 Fla. St. U.L.Rev. 503 (1994). In January 1923, the small town of Rosewood, Florida, inhabited entirely by African-Americans, was burned to the ground by a group of whites after a white woman claimed she had been raped by an African-American man. *Id.* at 505-07. In addition, at least eight African-Americans were murdered. *Id.; see also* Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 Or. L.Rev. 647, 679 (1996). In 1994, Florida passed House Bill 591, which

authorized compensation for the victims of this massacre, and their direct descendants. Bassett, *supra*, at 517-18. The compensation included up to $150,000 for each survivor, and college scholarships for their descendants. *Id.*

Legislatures, both federal and state, are thus sometimes inclined to award compensation to victims of historical injustices. *See* Pub.L. No. 100-383, 102 Stat. 903 (1988) (awarding compensation to Japanese individuals interred during World War II); *see also* Bassett, *supra*, (describing how the Florida legislature awarded compensation to victims and descendants of victims of the 1923 Rosewood, Florida massacre). Courts of law, however, are constrained by judicial doctrine and precedent, including concepts of standing, statutes of limitations, and the political question doctrine. Legislatures, both state and federal, face no such conceptual and doctrinal constraints. For that reason, advocates of slave reparations may resolve to bring their concerns and demands to the legislative and executive branches of the government, rather than the adjudicative and adversarial judicial branch.

III. OVERVIEW OF THE PROCEEDINGS

A. Parties

1. Plaintiffs

Beginning in 2002, a number of lawsuits were filed by descendants of slaves seeking reparations from private corporations that were alleged to have unjustly profited from the institution of slavery. On October 25, 2002, the Judicial Panel on Multidistrict Litigation transferred these actions to

this court for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. *See In re African-American Slave Descendants Litigation*, 231 F.Supp.2d 1357 (Jud.Pan.Mult.Lit.2002). This litigation then consisted of nine individual lawsuits. As directed by the court, the individual Plaintiffs filed a consolidated complaint, which, upon later review, the court dismissed without prejudice. The court held that the Plaintiffs had failed to state a cause of action, had no standing to bring the suit, and that the suit was barred by the political question doctrine and statutes of limitations. *See In re African-American Slave Descendants Litigation*, 304 F.Supp.2d 1027 (N.D.Ill.2004). The court then granted Plaintiffs leave to file a second amended complaint. Plaintiffs have since filed their Second Consolidated and Amended Complaint, which also consists of nine individual suits. *See* SCAC.[3] The Plaintiffs in the SCAC include the following: Deadria Farmer-Paellmann,[4] Mary Lacey Madison,[5] Andre Carrington,[6] John Bankhead, as

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3. The citations in this Opinion are to the paragraphs as styled in Plaintiffs' Complaint; however, in certain instances the numbering of paragraphs does not proceed in chronological order.

4. Farmer-Paellmann alleges that she is the "great-great-granddaughter of Clara and Abel Hinds, Africans who were enslaved on a South Carolina sea island rice plantation." *See* SCAC, ¶ 65.

5. Madison alleges that her "ancestors were slaves in the agricultural, cotton, and tobacco industry in Virginia and North Carolina." *See* SCAC, ¶ 68.

6. Carrington alleges that his maternal and paternal ancestors "were slaves in North Carolina, and . . . were involved in the cotton and tobacco industries." *See* SCAC, ¶ 71.

administrator of the Estate of Edlee Bankhead,[7] Richard Barber, Sr.,[8] Hannah Hurdle-Toomey, as administrator of the Estate of Andrew Jackson Hurdle,[9] Marcelle Porter, as administrator of the Estate of Hettie Pierce,[10] Julie Mae Wyatt-Kervin,[11] the Estate of Emma Marie Clark,[12] Ina Bell Daniels Hurdle McGee,[13] Cain Wall Sr., and seven other individuals who assert they were formerly enslaved,[14] and Antoinette Harrell Miller.[15] These named Plaintiffs (hereinafter collectively referred to as "Plaintiffs"), on behalf

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7. The Estate of Edlee Bankhead alleges that Bankhead's parents were enslaved in Mississippi. *See* SCAC, ¶ 74.

8. Barber alleges that his ancestors were born into slavery, and were enslaved in the agricultural industry and other industries. *See* SCAC, ¶¶ 76-79.

9. Hurdle-Toomey alleges that her father, Andrew Jackson Hurdle, was a slave who was sold into slavery when he was ten years old. *See* SCAC, ¶ 81.

10. Porter alleges that her great grandmother, Hettie Pierce, was a slave in North Carolina. *See* SCAC, ¶ 84.

11. Wyatt-Kervin alleges that she is the daughter of former slaves, Jake and Louise Wyatt. *See* SCAC, ¶ 85.

12. Clark's Estate alleges that Clark was a slave in Louisiana from 1927-1934. *See* SCAC, ¶ 86.

13. McGee alleges that she is the "great grand-daughter of Andrew Jackson Hurdle, an enslaved African." *See* SCAC, ¶ 90.

14. *See* SCAC, ¶¶ 92-100.

15. Miller alleges that she is a descendant of a former slave, Carrie Richardson. *See* SCAC, ¶ 102.

of themselves and the classes they seek to represent,[16] seek reparations on behalf of all "formerly enslaved Africans and their descendants," and all living "former enslaved African-Americans and their descendants. . . ." *See* SCAC, ¶ 48. Specifically, Plaintiffs seek an accounting, disgorgement of profits, the creation of an "independent historical commission" to study Defendants' actions, a constructive trust, restitution, and compensatory and punitive damages arising out of the named Defendants' alleged past and continued wrongful conduct relating to the institution of slavery. *See id.* ¶ 3.

2. Defendants

The named Defendants (hereinafter collectively referred to as "Defendants") are seventeen present-day companies whose predecessors are alleged to have been unjustly enriched through profits earned either directly or indirectly from the Trans-Atlantic Slave Trade and slavery between 1619 and 1865, as well as post-Emancipation slavery.

Defendants include the following companies: FleetBoston Financial Corporation, CSX Corporation, Aetna Inc., Brown Brothers Harriman & Company, New York Life Insurance Company, Norfolk Southern Corporation, Lehman Brothers Corporation, Lloyd's of London, Union Pacific Railroad, JP Morgan Chase, R.J. Reynolds Tobacco

16. Plaintiffs refer to a proposed class of plaintiffs, and assert that this suit may be brought as a class action under Federal Rule of Civil Procedure 23(a) and (b). *See* SCAC, ¶ 49. Plaintiffs have not, however, filed any separate motion for class certification pursuant to the Federal Rules of Civil Procedure.

Company, Brown and Williamson, Liggett Group Inc., Canadian National Railway, Southern Mutual Insurance Company, American International Group ("AIG"), and Loews Corporation.[17]

Plaintiffs allege that FleetBoston, through its predecessor bank, made loans to slave traders and also collected custom duties and fees on ships engaged in the slave trade. *See id.* ¶¶ 125-26. Plaintiffs further allege that "FleetBoston engaged in a self-concealed business enterprise so that the Plaintiffs and others similarly situated would not be aware of the existence of this enterprise," and, in more recent times, "made various misleading statements to the Press from March 2000 to February 2002, attempting to disassociate its predecessor company from its current company." *Id.* ¶ 128.

Plaintiffs allege that CSX "is a successor-in-interest to numerous predecessor railroad lines that were constructed or run, at least in part, by slave labor." *Id.* ¶ 129. Plaintiffs further allege that "CSX engaged in a self-concealed business enterprise as the plaintiffs and others similarly situated would not be aware of the existence of this enterprise," and, in more recent times, "withheld information or made a misleading statement to the Press regarding their participation in and profiting from slavery." *Id.* ¶¶ 131-33.

Plaintiffs allege that "Aetna's predecessor in interest, provided the instrumentality of slavery by underwriting insurance policies for slave owners against the loss of their

17. Loews Corporation does not join in the present motion to dismiss. Loews has filed a separate motion to dismiss, based on grounds it asserts are unique to it.

African slaves. . . ." *Id.* ¶ 136. Plaintiffs further allege that "Aetna engaged in a self-concealed business enterprise as the plaintiff class and/or plaintiff ancestors would not be aware of the existence of this enterprise. . . ." and, in more recent times, "withheld information or made a misleading statement regarding their participation in and profiting from slavery." *Id.* ¶¶ 142-43.

Plaintiffs allege that Brown Brothers Harriman "is the successor corporation to Brown Brothers & Co.," which "loaned millions directly to planters, merchants and cotton brokers throughout the South." *Id.* ¶¶ 145-46. Plaintiffs also allege that "Louisiana court records dating back to the 1840's . . . reveal the firm's ownership of at least two cotton plantations totaling 4,614 acres and the plantations' 346 slaves. . . ." *Id.* ¶ 148. Plaintiffs further allege that "Brown Brothers Harriman engaged in a self-concealed business enterprise as the plaintiff class and/or plaintiff ancestors would not be aware of the existence of this enterprise. . . ." and, in more recent times, "withheld information or made a misleading statement based on press reports in an attempt to disassociate itself from its predecessor's business." *Id.* ¶¶ 151-52.

Plaintiffs allege that "New York Life's predecessor-in-interest, Nautilus Insurance, earned premiums from its sale of life insurance to slave owners." *Id.* ¶ 155. Plaintiffs further allege that "New York Life engaged in a self-concealed business enterprise as the plaintiff class and/or plaintiff ancestors would not be aware of the existence of this enterprise. . . ." and, in more recent times, "withheld information or made misleading statements regarding their participation in and profiting from slavery." *Id.* ¶¶ 159, 162.

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Plaintiffs allege that Norfolk Southern "is a successor-in-interest to numerous railroad lines that were constructed or run, in part, by slave labor." *Id.* ¶ 163. Plaintiffs further allege that Norfolk "participated in the institution of slavery in that it derived the benefits of unpaid slave labor and it provided financial supports to slave owners and slave traders." *Id.* ¶ 165.

Plaintiffs allege that the founder of Lehman Brothers, Henry Lehman, and his brothers "grew rich as middlemen in the slave-grown cotton trade." *Id.* ¶ 168. Plaintiffs further allege that Lehman Brothers owned slaves. *Id.* ¶ 171.

Plaintiffs allege that Lloyd's of London "insured ships utilized for the Trans-Atlantic slave trade." *Id.* ¶ 173. Plaintiffs further allege that "Lloyd's engaged in a self-concealed business enterprise as the plaintiff class and/or plaintiffs' ancestors would not be aware of the existence of this enterprise. . . ." *Id.* ¶ 174.

Plaintiffs allege that Union Pacific "is a successor-in-interest to numerous predecessor railroad lines that were constructed or run in part by slave labor." *Id.* ¶ 177. Plaintiffs further allege that "Union Pacific engaged in a self-concealed business enterprise as the plaintiff class and/or plaintiffs' ancestors would not be aware of the existence of this enterprise. . . ." and, in more recent times, "withheld information or made a misleading statement regarding their participation in profiting from slavery." *Id.* ¶¶ 178-79.

Plaintiffs allege that "two of [the] predecessor banks that merged to become J.P. Morgan Chase were behind a

consortium to raise money to insure slavery." *Id.* ¶ 181. Plaintiffs further allege that "J.P. Morgan Chase engaged in a self-concealed business enterprise as the plaintiff class and/or plaintiffs' ancestors would not be aware of the existence of this enterprise," and, in more recent times, "withheld information or made a misleading statement regarding their participation in and profiting from slavery." *Id.* ¶ 182.

Plaintiffs allege that R.J. Reynolds Tobacco Company, Brown & Williamson, Liggett Group, and Loews Corporation (parent company of Lorillard Tobacco Company) were all once part of the American Tobacco Company. *Id.* ¶ 197. As parts of this larger enterprise, Plaintiffs assert, these Defendants are "all beneficiar[ies] of assets acquired through the forced and uncompensated labors of enslaved African-Americans." *Id.* ¶ 185; *see also id.* ¶¶ 201, 204, and 210.

Plaintiffs allege that Canadian National Railway "is the successor-in-interest to seven predecessor railroad lines, that were constructed and/or run in part by slave labor." *Id.* ¶ 213. Plaintiffs further allege that "Canadian National engaged in a self-concealed business enterprise as the plaintiff class and/or plaintiff ancestors would not be aware of the existence of this enterprise. . . ." *Id.* ¶ 215.

Plaintiffs allege that Southern Mutual Insurance "issued policies on the lives of slaves in Louisiana." *Id.* ¶ 219. Plaintiff further alleges that Southern Mutual "aided and abetted those who engaged in the maintenance of slavery through the intentional infliction of emotional distress." *Id.* ¶ 218.

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Plaintiffs allege that AIG's predecessors "provided instrumentalities of slavery by selling insurance policy [sic] to cover the lives of enslaved Africans with slave owners as beneficiaries." *Id.* ¶ 221. Plaintiffs further allege that AIG's predecessors "aided and abetted those who engaged in the maintenance of slavery." *Id.* ¶ 223.

As evidenced by Plaintiffs' allegations, and as the court shall further discuss, their SCAC is devoid of any allegations that connect the specifically named Defendants or their predecessors and any of the Plaintiffs or their ancestors.

B. Pleadings

1. Factual Allegations of Plaintiffs' Second Consolidated and Amended Complaint

Plaintiffs' SCAC begins with a narration of the historical background of the Transatlantic Slave Trade in America. The Complaint proceeds to describe the Slave Codes, which various States enacted in order to perpetuate the institution of slavery. The Complaint also chronicles how the forced labor of enslaved Africans helped to build our Nation and enrich early American industry, while simultaneously dismantling a culture and impoverishing a race of fellow men and women.

The SCAC then outlines the beginnings of laws that outlawed the trafficking and trade of slaves, which progressed into a body of law that found the institution of slavery to be contrary to the Natural Law of Man. The Complaint proceeds to allege that despite this body of law that found the

institution of slavery to be contrary to the Natural Law of Man, the vestiges of slavery, in the form of racism, have resulted in modern-day disparities between descendants of slaves and the remainder of our society.

Ultimately, the SCAC alleges that "Defendants' actions caused Plaintiffs economic losses and cultural psychic scars and heretofore without remedy." SCAC, ¶ 41. Plaintiffs allege that the practice of slavery has caused the following specific social inequities:

> twenty-six (26) percent of African-Americans in the United States live in poverty compared to eight (8) percent of whites. . . . 14.7 percent of African-Americans have four-year college degrees, compared with 25 percent of whites. . . . [A] black person born in 1996 can expect to live, on average, 6.6 fewer years than a white person. . . . African-Americans are more likely to go to jail, to be there longer and . . . to receive the death penalty. . . . [African-Americans] lag behind whites according to every social yardstick: literacy, life expectancy, income and education. They are more likely to be murdered and less likely to have a father at home. . . . Black families earn only $580 for every $1000 earned by white families.

Id. ¶ 41 n. 1.

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2. Counts of Plaintiffs' Second Consolidated and Amended Complaint

Count I of Plaintiffs' SCAC is styled: "Conspiracy." Plaintiffs allege that "[e]ach of the defendants acted individually and in concert with their industry group and with each other, either expressly or tacitly, to participate in a plan that was designed in part to commit the tortious acts referred to herein." *Id.* ¶ 258.

Count II is styled: "Conversion." Plaintiffs allege that "[t]he enslaved Africans had a property right in themselves." *Id.* ¶ 270. Plaintiffs then allege that "[t]his property right was wrongfully and illegally taken." *Id.* ¶ 271. Plaintiffs further allege that "defendants have willfully and wrongfully misappropriated and converted the value of [slave] labor and its derivative profits into defendants' own property." *Id.* ¶ 278. Plaintiffs' prayer for relief under Count II seeks an accounting of profits earned from slave labor, a constructive trust imposed on such profits, restitution, equitable disgorgement, and punitive damages. *See id.* ¶ 280.

Count III is styled: "Unjust Enrichment." Plaintiffs allege that "[d]efendants' failure to pay for the labor provided by the slaves without receiving any compensation, has allowed defendants to retain a benefit at the expense of plaintiffs and their ancestors." *Id.* ¶ 284. Plaintiffs further allege that "[d]efendants have failed to account for and or return to plaintiffs and the plaintiff class the value of their ancestors' slave labor and/or the profits and benefits the defendants derived therefrom. . . ." *Id.* ¶ 283. Plaintiffs' prayer for relief under Count III seeks an accounting of profits earned from

slave labor, a constructive trust imposed on such profits, restitution, equitable disgorgement, and punitive damages. *See id.* ¶ 288.

Count IV is styled: "Replevin." Plaintiffs allege that "defendants hold personal property that was never properly vested in them . . . because the enslaved person's work was unpaid, stolen, and forcibly held." *Id.* ¶¶ 290-91. Plaintiffs further allege that defendants "fraudulently concealed the cause of action from the heirs or the estates [of Plaintiffs], so that the statute of limitations does not begin to accrue until the full facts of the cause of action are revealed to the heirs and the estate [of Plaintiffs]." *Id.* ¶ 296. Plaintiffs' prayer for relief under Count IV seeks an accounting of profits earned from slave labor, a constructive trust imposed on such profits, restitution, equitable disgorgement, and punitive damages. *Id.* ¶ 298.

A second Count IV is styled: "42 U.S.C. § 1982."[18] Plaintiffs allege that as a result of the Defendants' conduct in denying slaves the value of their labor, and restricting slaves' access to corporate records regarding Defendants' participation in slavery, the Plaintiffs' ancestors' and their descendants' rights to inherit and convey property have been violated in contravention of 42 U.S.C. § 1982. *Id.* ¶ 300.

Count V is styled: "Intentional Infliction of Emotional Distress." Plaintiffs allege that "Defendants' predecessor companies aided or abetted, or under other theories of secondary liability . . . , participated in, allowed, or implicitly

18. Plaintiffs allege Count IV twice. The first Count IV is styled "Replevin." The second Count IV is styled "42 U.S.C. § 1982."

or recklessly, sanctioned, and/or benefitted from an institution that relied on the sexual exploitation, violent abuse and rape to achieve its goals of a malleable and unpaid work force." *Id.* ¶ 305. Plaintiffs further allege that "[t]he violence and crimes against the enslaved group were done with the calculated intent of demeaning, subjugating, and controlling the enslaved population for the purposes of exploitation for profit and for the direct benefit of commercial industries." *Id.* Plaintiffs' prayer for relief under Count V seeks an accounting of profits earned from slave labor, a constructive trust imposed on such profits, restitution, equitable disgorgement, and punitive damages. *Id.* ¶ 310.

Count VI is styled "Negligent Infliction of Emotional Distress." Plaintiffs allege that, as a result of Defendants' negligent conduct and omissions in relation to the slave trade and the slavery industry, "Plaintiffs and their deceased enslaved African ancestors suffered emotional distress and mental anguish." *Id.* ¶ 314.

Counts VII-XIII[19] of the Plaintiffs' Complaint allege violations of various state consumer protection laws. Specifically, Count VII alleges violations of the New York Consumer Protection from Deceptive Acts and Practices Law, NY Gen. Bus. Law §§ 349-350; Count IX alleges violations of the Texas Deceptive Trade Practices and Consumer Protection Act, Tex. Bus. & Com.Code § 17.41 et seq.; Count X alleges violations of California's Preservation and Regulation of Competition Law, Cal. Bus. & Prof.Code § 17200 et seq.; Count XI alleges violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815

19. Plaintiffs include no Count VIII.

Ill. Comp. Stat. 505/1 et seq.; Count XII alleges violations of the Louisiana Unfair Trade Practices and Consumer Protection Law, La.Rev.Stat. Ann. § 51:1401 et seq.; Count XIII alleges violations of the New Jersey Unfair Trade Practices Law, N.J. Stat. Ann. § 56:8-1 et seq. *See* SCAC ¶¶ 315-366.

In essence, the Plaintiffs seek reparations from Defendants for their alleged roles in the institution of human chattel slavery as it existed in the United States from 1619 through 1865, to date.

3. Plaintiffs' Second Consolidated and Amended Complaint is Not Materially Different from Plaintiffs' First Consolidated and Amended Complaint

Plaintiffs' SCAC repeats many of the same factual and legal allegations found in Plaintiffs' First Consolidated and Amended Complaint ("FCAC"). The FCAC and the SCAC both begin with a lengthy allegation of the historical background of the Trans-Atlantic Slave Trade, the institution of slavery in the colonies and the United States, the "state slave codes" which gave legal sanction to slavery, the horrors of slavery, and the eventual abolishment of slavery. Both Complaints then go on to allege that the institution of slavery still negatively impacts African-Americans. The Complaints allege, *inter alia*, that African-Americans receive fewer college degrees than whites, have less income than whites, and are more likely to be incarcerated than whites. The Complaints further allege that Defendants' participation in the slave trade and the institution of slavery is a direct cause of these harms.

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Both Complaints include the following Counts: Conspiracy, Intentional Infliction of Emotional Distress, Conversion, Unjust Enrichment, and 42 U.S.C. § 1982. The Conspiracy Counts are generally materially similar, and they are virtually identical in places. *Compare* FCAC, ¶¶ 215-17 *with* SCAC, ¶¶ 257-67. The Intentional Infliction of Emotional Distress Counts again are generally materially similar, and they are virtually identical in places. *Compare* FCAC, ¶¶ 232-35 *with* SCAC, ¶¶ 304-10. The Conversion Counts are also generally materially similar, and they are virtually identical in places, although Plaintiffs now allege that the slaves had a property interest in themselves as well as a property interest in their labor. *Compare* FCAC, ¶¶ 239-42 *with* SCAC, ¶¶ 268-80. The Unjust Enrichment Counts as well are materially similar, and are virtually identical in places. *Compare* FCAC, ¶¶ 243-53 *with* SCAC, ¶¶ 281-88. The 42 U.S.C. § 1982 Count is virtually identical in both Complaints. *Compare* FCAC, ¶¶ 254-60 *with* SCAC, ¶¶ 299-303. Both Complaints also include numerous Counts alleging violations of various state consumer fraud and fair trade statutes. *Compare* FCAC, ¶¶ 244-53 *with* SCAC, ¶¶ 315-66. Plaintiffs' allegations in the various SCAC Counts are, in many places, word for word repetitions of allegations made in FCAC Counts. *Compare*, *e.g.*, FCAC, ¶ 255 *with* SCAC, ¶ 300.

The SCAC adds new Counts of Replevin and Negligent Infliction of Emotional Distress. However, the fundamental problems contained within the FCAC, Plaintiffs' lack of standing, the political question issue, the statutes of limitations, and Plaintiffs' failure to state a claim on which relief can be granted, have not been resolved by the SCAC.

Plaintiffs' SCAC still fails to state a claim upon which relief could be granted, and also fails to allege any facts that would indicate that Plaintiffs have standing, that the issue of slave reparations is not a political question, or that the applicable statutes of limitations have not expired.

4. Defendants' Joint Motion to Dismiss Plaintiffs' Second Consolidated and Amended Complaint

Defendants have responded to Plaintiffs' Second Consolidated and Amended Complaint with the present Joint Motion to Dismiss, brought pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6).[20] *See* Defs.' Joint Mot. to Dismiss Pls.' Second Consolidated and Amd. Compl., at 1. Defendants allege four separate grounds which, they assert, warrant dismissal: (1) Plaintiffs' claims fall short of both constitutional and prudential standing requirements; (2) all of Plaintiffs' claims are time-barred; (3) Plaintiffs' claims present a non-justiciable political question; and (4) Plaintiffs fail to state any cognizable claim. *Id.* at 1-2.

Defendants' Joint Motion to Dismiss Plaintiffs' Second Consolidated and Amended Complaint is now fully briefed and before the court.

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20. Loews Corporation has not joined in the present Motion to Dismiss. Loews Corporation has filed a separate Motion to Dismiss, to which Plaintiffs have failed to reply. The court therefore dismisses this action as to Defendant Loews Corporation, pursuant to Local Rule 78.3.

Appendix B

IV. DISCUSSION

A. Justiciability Doctrines

Article III, § 2 of the United States Constitution provides that federal courts have jurisdiction only if presented with a "Case" or "Controversy." The requirement of a case or controversy imposes a "dual limitation" upon the federal courts. *See Flast v. Cohen*, 392 U.S. 83, 94, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). First, the requirement of a case or controversy serves to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Id.* Second, the requirement of a case or controversy serves to "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Id.* This "dual limitation" found in the requirement of a case or controversy is enforced by what have been termed the justiciability doctrines of Article III, which state the fundamental limits on federal judicial power in our system of government. *See Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). "Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so." *Renne v. Geary*, 501 U.S. 312, 316, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991). The justiciability doctrines include principles such as the prohibition against advisory opinions, standing, ripeness, mootness, and the political question doctrine. *See generally* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 46 (Aspen Law & Business 1997). "The Article III doctrine that requires a litigant to

have 'standing' to invoke the power of a federal court is perhaps the most important of these doctrines." *Allen*, 468 U.S. at 750, 104 S.Ct. 3315.

1. Standing

Defendants first assert that Plaintiffs lack standing to bring these claims in a federal court. Mem. in Supp. of Defs.' Joint Mot. to Dismiss Pls.' Second Consolidated Amd. Compl., at 2-3 (hereinafter, "Mem. in Supp. of Defs.' Mot. to Dismiss II").[21] The doctrine of standing ensures that a litigant is the proper party to bring a matter before a federal court for adjudication, by asking if that specific litigant has a sufficient stake in the matter to invoke the federal judicial process. This central principle of United States Supreme Court jurisprudence has deep historical roots. *See Miss. & M.R. Co. v. Ward*, 67 U.S. 485, 491, 2 Black 485, 17 L.Ed. 311 (1863) ("unless he shows that he has sustained, and is still sustaining, individual damage, he cannot be heard"). As the Supreme Court recently reiterated: "We have consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Raines v. Byrd*, 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

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21. Defendants incorporate by reference their previous Memorandum in Support of Defendants' Joint Motion to Dismiss the Plaintiffs' First Consolidated and Amended Complaint (hereinafter "Mem. in Supp. of Defs.' Mot. to Dismiss I") into their present Memorandum.

Appendix B

a. Historical Overview of the Doctrine of Standing

The requirement that a litigant demonstrate standing—a personal stake in an alleged dispute—to bring a matter before a court for adjudication has been a bedrock principle in our system of law, as well as the common law system from which our system of law developed. The standing doctrine comes from the well-known common law doctrine of *locus standi*, which translated from Latin means "place of standing." In essence, the doctrine of *locus standi* concerns whether an individual has the legal capacity to institute proceedings. *See, e.g.*, S.M. Thio, *Locus Standi and Judicial Review* 13-14, 235-36 (1971) (analyzing the doctrines of standing in the United States and in other common law countries). The concept of standing, or *locus standi*, was well known to the early federal courts. *See, e.g., Southern Exp. Co. v. Western N.C.R. Co.*, 99 U.S. 191, 201, 25 L.Ed. 319 (1878) (holding that since appellant had no legally cognizable interest in the suit, appellant "can, therefore, have no *locus standi* in a court of equity").

The standing doctrine serves to reinforce that "[t]he province of the court is, solely, to decide on the rights of individuals. . . .." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803). As stated in an authoritative nineteenth century treatise: "The general rule is that the action should be brought in the name of the party whose legal right has been affected, against the party who committed or caused the injury, or by or against his personal representative." Joseph Chitty, *A Treatise on Pleading and Parties to Actions*

1 (G. & C. Merriam 1867). In specific reference to tort actions, that treatise provides:

> The action for a tort must in general be brought in the name of the person whose *legal* right has been affected, and who was *legally* interested in the property at the time the injury thereto was committed; for he is impliedly the party injured by the tort, and whoever has sustained the loss is the proper person to call for compensation from the wrongdoer.

Id. at 59 (emphasis in original and footnotes omitted). This treatise was relied upon by the United States Supreme Court in *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 407, 21 S.Ct. 206, 45 L.Ed. 252 (1900), in which the Supreme Court discussed the proper parties to litigation. In elucidating the standing doctrine's focus on the rights of individuals, the *Tyler* Court stated:

> The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defense set up by the party pursued. Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens.

Id. at 406, 21 S.Ct. 206. In *Tyler*, the Court reiterated that the doctrine of standing "has been announced in so many cases in this court that it may not be considered an open question." *Id.*

This core aspect of the doctrine of standing—that a litigant must demonstrate a personal stake in an alleged dispute—has remained unchanged as the Supreme Court has elucidated the modern formulation and rationale for the doctrine.

b. Modern Formulation of the Doctrine of Standing

The modern standing doctrine involves both constitutional limitations on federal courts, based on Article III, and prudential limitations on the exercise of federal court jurisdiction. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). "Article III standing . . . enforces the Constitution's case or controversy requirement. . . ." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 124 S.Ct. 2301, 2308, 159 L.Ed.2d 98 (2004). The Supreme Court has explained that "prudential standing encompasses 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.' " *Id.*, 124 S.Ct. at 2309 (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)). Without the doctrine of standing, "the courts would be called upon to decide abstract questions of wide

public significance even though other governmental institutions may be more competent to address the questions. . . ." *Id.*

The modern formulation of the constitutional limitations of the standing doctrine was elucidated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), where the Supreme Court stated:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61, 112 S.Ct. 2130 (citations and internal quotations omitted). The principle of standing is therefore commonly viewed as requiring a legally sufficient relationship between the parties in a suit. "Under the standing doctrine, the relationship becomes legally important only if the defendant is in some way both directly responsible for causing [plaintiff's] injury, and able to redress it." Eric J.

Miller, *Representing the Race: Standing to Sue in Reparations Lawsuits*, 20 Harv. Blackletter L.J.. 91, 93 (2004). "This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement." *Steel Co. v. Citizens For a Better Environment*, 523 U.S. 83, 103-04, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). These constitutional limitations on standing "are not confined to the facts of any particular case, but are broadly relevant to standing in any Article III controversy." *Plotkin v. Ryan*, 239 F.3d 882, 884 (7th Cir.2001); *see also Books v. Elkhart County, Ind.*, 401 F.3d 857, 861 (7th Cir.2005).

The party seeking to invoke federal court jurisdiction has the burden of establishing the elements of standing. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. "[S]ince they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* The present motion is a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b), and in this posture "we must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations." *Citizens For a Better Environment*, 523 U.S. at 104, 118 S.Ct. 1003. "However, [w]here standing is challenged as a factual matter, the plaintiff bears the burden of supporting the allegations necessary for standing with competent proof." *Perry v. Village of Arlington Heights*, 186 F.3d 826, 829 (7th Cir.1999) (quoting *Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856, 862

(7th Cir.1996)) (internal quotations omitted); *see also McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936) (indicating that the party invoking federal court jurisdiction must "allege in his pleading the facts essential to show jurisdiction [and][i]f he fails to make the necessary allegations he has no standing"). " 'Competent proof' requires a showing by a preponderance of the evidence that standing exists." *Perry*, 186 F.3d at 829 (quoting *NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir.1995)); *see also McNutt*, 298 U.S. at 189, 56 S.Ct. 780 (stating that when "allegations of jurisdictional facts are challenged . . . in any appropriate manner, [the party alleging jurisdiction] must support them by competent proof;" and if unchallenged, the federal courts "may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence").

c. Plaintiffs' Allegations in Support of their Standing to Maintain this Suit

In general, Plaintiffs claim that the source of their injury is the institution of slavery. Plaintiffs first point to four distinct injuries which they allege are sufficient to confer them standing to maintain this suit. Plaintiffs allege that they currently suffer concrete, direct harm as descendants of slaves, in that they presently do not have "the same opportunities as [do] their white contemporaries, . . . [do] not have to overcome barriers to their human right to development which their white contemporaries [do] not, . . . suffer irreparable psychological damage from the loss of their history, language and culture," . . . and that they do not "know the actual birth names of . . . their forebearers and,

consequently, to this day do not know their own real names." Pls.' Mem. in Opp. to Defs.' Joint Mot. to Dismiss the Second Amended and Consolidated Compl., at 1-2 (hereinafter "Mem. in Opp. to Defs.' Mot. to Dismiss II"). Next, Plaintiffs allege that particular Plaintiffs, Cain Wall and his children, and Emma Clark, were themselves actually enslaved in the twentieth century. *Id.* at 2.[22] Plaintiffs then allege that, as they have filed or will file the necessary paperwork to become administrators of their ancestor's estates, they have suffered an actual, particularized injury by being denied their rightful inheritances. *Id.*

Further, Plaintiffs allege that they have "suffered segregation, lost opportunity, diminished self-worth and value, loss of property rights, loss of derivative property rights, and psychological harm. . . ." SCAC, ¶ 108. Plaintiffs also allege that they are "presently consumers of Defendants" and have been injured by certain communications made by the Defendants concerning Defendants' respective roles in the institution of slavery. *See id.* ¶ 104. Specifically, Plaintiffs allege that "[d]ue to unconscionable, fraudulent and deceptive public communications made by defendants, plaintiffs suffered the harm of being misled, confused, and deceived about the roles the defendants played in the enslavement of African people." *Id.* Additionally, Plaintiffs allege injury

22. Plaintiffs do not, however, allege that these specific Plaintiffs were enslaved by Defendants or any predecessors-in-interest of Defendants. Even if these allegations were true, any harms suffered by these specific Plaintiffs are not "fairly traceable" to the Defendants. *See Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130. Such allegations are therefore insufficient to confer standing on these specific Plaintiffs. *See id.*

through the Defendants' alleged continuing violation of state consumer protection laws. SCAC, Counts VII-XIII; Mem. in Opp. to Defs.' Mot. to Dismiss II, at 9-14.

However, "[e]ven if [Plaintiffs'] claimed injury is sufficiently specific, it is not clear that [Plaintiffs themselves are] harmed. The fact of having an enslaved ancestor, even one transported, insured, or put to work by the defendants, does not seem sufficient injury without something more." Miller, *supra*, at 97 (commenting specifically on the instant case). "[D]escent from slaves is not of itself an injury, rather the sorts of legally relevant injuries are harms suffered by individuals that are attributable to the ongoing effects of slavery." *Id.* The type of injuries Plaintiffs are alleging in this case therefore cannot be understood as run-of-the-mill, traditional injuries as are commonly found in most tort claims. Plaintiffs are alleging that injuries to their long-dead ancestors are causing them concrete harm today. "[P]arties suffering non-traditional injuries must prove, *to a virtual certainty*, the causal link between the action challenged and the claimed injury. . . ." Laveta Casdorph, *The Constitution and Reconstitution of the Standing Doctrine*, 30 St. Mary's L.J. 471, 502 (1999) (emphasis added). Plaintiffs face insurmountable problems in establishing "to a virtual certainty" that they have suffered concrete, individualized harms at the hands of Defendants. "[A]n essential prerequisite to bringing suit is the plaintiff's ability to establish with precision her relationship to the injury and the defendant." Miller, *supra*, at 93. In terms of slavery reparations, the "'traditional' model . . . seeks suit against a defendant or defendants on behalf of a plaintiff class comprised of descendants of slaves." *Id.* In such situations, plaintiffs

"assume[ ] that a familial relationship between the ancestor victim and the descendant plaintiff—what might be called hereditary or genetic standing—is sufficient to bring suit." *Id.* An assumption such as this is difficult to implement in practice. "The notion that standing can be inherited (the 'genetic' theory of standing) is . . . legally . . . suspect; and the notion that groups, rather than individuals, have standing to sue, is legally insupportable." *Id.* at 94.

(1). Constitutional Limitations on Standing

(a). Derivative Harm

It is well-established that a plaintiff must " 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.' " *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)). Plaintiffs cannot establish a personal injury by merely identifying tort victims and alleging a genealogical relationship. The illegal conduct at issue here, the institution of slavery, is alleged to have directly affected Plaintiffs' ancestors. Plaintiffs now, more than a century later, point to that horrific institution as the source of their derivative injury.[23] However, Plaintiffs' own choice of words, *derivative*, should be sufficient to signify the standing

23. Several of the named Plaintiffs allege to have been slaves during the twentieth century, but also fail to establish standing to sue Defendants for their alleged injuries. *See* discussion *infra* at n. 22, and 750.

problem in this case. *See* SCAC, ¶ 114. Plaintiffs fail to allege that they have personally suffered a concrete and particularized injury as a result of Defendants' putatively illegal conduct; rather, Plaintiffs' alleged injury is derivative of the injury inflicted upon enslaved African-Americans over a century ago. *See, e.g., id.* ¶ 111 ("Each Plaintiff African-American slave descendant has suffered by the Defendants' failure to pay their ancestors for their labor as slaves or as sharecroppers, peons or even slaves"). This is insufficient to establish standing, and contrary to centuries of well-settled legal principles requiring that a litigant demonstrate a personal stake in an alleged dispute. *See, e.g., Tyler*, 179 U.S. at 406-07, 21 S.Ct. 206 (stating that a plaintiff must "aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens"); *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (stating that a "plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is . . . concrete and particularized"); *Raines*, 521 U.S. at 819, 117 S.Ct. 2312 (stating that "a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him"); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L.Rev. 881, 881-82 (1983) ("I suggest that courts need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury be a particularized one. . . ."). To recognize Plaintiffs' standing in this case "would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.' " *Allen*, 468 U.S. at 756, 104 S.Ct. 3315 (citing *United States v. SCRAP*, 412 U.S. 669, 687, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)).

In addition, the injury alleged cannot be "conjectural or hypothetical." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. Plaintiffs allege injury through being "denied the economic wealth of his or her ancestors' labor;" Plaintiffs also allege they hold a "derivative and inherited property right in their ancestors' lost pay. . . ." SCAC, ¶¶ 113-14. However, Plaintiffs' claim to the economic wealth of their ancestors' labor is conjectural. While most would like to assume that they will be the beneficiaries of their ancestors' wealth upon their demise, this is a mere assumption. Plaintiffs can only speculate that their ancestors' estates would have been passed on to them, and cannot say that they would have inherited their ancestors' lost pay. This is insufficient to show a personal injury to Plaintiffs.

Further, the Plaintiffs must allege a "causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. "[T]he injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. . . ." *Id.* The allegations of Plaintiffs' SCAC do not link these Defendants to the alleged harm. Plaintiffs fail to allege any facts in their Complaint that directly link the specifically named Defendants to the alleged injuries suffered by the Plaintiffs; nor does the Plaintiffs' Complaint allege a direct connection between any of the named Defendants and any of the Plaintiffs' ancestors. The named Plaintiffs who allege that they are descendants of enslaved African-Americans fail to allege that their ancestors were enslaved by any of the seventeen specifically named Defendants. Likewise, the named Plaintiffs who allege that they were slaves fail to allege that they were enslaved

by any of the seventeen specifically named Defendants. Plaintiffs' only response to this fundamental defect is to allege that Defendants were engaged in "co-dependent" industries and therefore are generally and vicariously liable for the institution of slavery. However, Plaintiffs fail to allege how their alleged harms are "not the result of the independent action of some third party not before the court. . . ." *See Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. Plaintiffs offer no allegations that Defendants had any relationship with specific entities that enslaved the named Plaintiffs or their ancestors. More than "unadorned speculation" is required to establish standing. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 43-44, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976).

(b). Continuing Injury

Plaintiffs' allegations that they suffer injury on a continuing basis also fail to establish the requisite standing. Plaintiffs claim a continuing injury through the allegation that "[t]hey still endure daily indignities from the legacy of slavery, including, but not limited to, racial profiling, racial slurs, and improper and hurtful assumptions regarding their overall status." SCAC, ¶ 115. Further, Plaintiffs allege that they "continue[ ] to be harmed to the present day, in that each . . . are deprived job opportunities, caused psychic harm, denied ability to inherit his or her fore-parents wealth." *Id.* ¶ 110.

Plaintiffs' allegations of continuing harm are no different than the allegations of continuing harm made by the plaintiffs in *Cato v. United States*, 70 F.3d 1103 (9th Cir.1995), and

other similar cases. In *Cato*, descendants of enslaved African-Americans filed a complaint against the United States government seeking damages due to the enslavement of, and subsequent discrimination against, African-Americans. *Cato*, 70 F.3d at 1105. The plaintiffs in *Cato* alleged injuries based on "disparities in employment, income, and education" between African-Americans and other racial groups. *Id.* at 1109. The *Cato* court found that such allegations were insufficient to establish an injury personal to the plaintiffs so as to establish the plaintiffs' standing; rather, such injuries were "a generalized, class-based grievance. . . ." *Id.* Other courts faced with similar complaints have also found that those plaintiffs had failed to establish their standing to litigate claims based on continuing injuries alleged to be the result of slavery. *See, e.g., Bell v. United States*, No. CIV. A. 301CV0338D, 2001 WL 1041792, at *2 (N.D.Tex. Aug.31, 2001) (plaintiff lacked standing to file suit against United States government seeking damages for the enslavement of African-Americans); *Bey v. United States Department of Justice*, No. 95 CIV 10401, 1996 WL 413684, at *1 (S.D.N.Y. July 24, 1996) (same); *Langley v. United States*, No. C 95-4227, 1995 WL 714378, at *2 (N.D.Cal. Nov.30, 1995) (same); *Himiya v. United States*, No. 94 C 4065, 1994 WL 376850, *2 (N.D.Ill. July 15, 1994) ("Although it is extremely regrettable that this country's history, as well as the history of many other countries, includes a significant history of slavery, the plaintiff does not have proper standing under the law to recover damages for this reprehensible time period"). Like the plaintiffs' allegations in *Cato* and the other slavery reparations cases decided after *Cato*, Plaintiffs' allegations of continuing harm in this case do not establish a concrete and particularized injury-in-fact, as these allegations

are too speculative and generalized. *See Lujan* 504 U.S. at 560-61, 112 S.Ct. 2130.

Plaintiffs argue that the other lawsuits seeking reparations for acts related to the institution of slavery are distinguishable on the grounds that those cases were brought by *pro se* plaintiffs, acting without the guidance of counsel, and against the United States Government, protected from suit by the doctrine of sovereign immunity.[24] These are distinctions without a difference. Those *pro se* plaintiffs could have been represented by attorneys and the result would not have changed.[25] Furthermore, the doctrine of sovereign immunity was only one of many jurisdictional bars to suit in those cases, including standing. The constitutional limitations on standing, including an injury-in-fact, "are not confined to the facts of any particular case, but are broadly relevant to standing in any Article III controversy." *Plotkin*, 239 F.3d at 884. Like the plaintiffs in those cases, Plaintiffs fail to allege

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24. Plaintiffs make this argument in their Memorandum in Opposition to Defendants' Joint Motion to Dismiss, 9-10 (hereinafter "Mem. in Opp. to Defs.' Mot. to Dismiss I"). Plaintiffs "incorporate by reference" their Mem. in Opp. to Defs.' Mot. to Dismiss I into their present Mem. in Opp. to Defs.' Mot. to Dismiss II.

25. In fact, courts give special treatment to *pro se* litigation. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (holding that allegations of *pro se* complaints are held to "less stringent standards than formal pleadings drafted by lawyers"); *see also Castro v. United States*, 540 U.S. 375, 381-82, 124 S.Ct. 786, 791-92, 157 L.Ed.2d 778 (2003) (indicating that while holding *pro se* complaints to less stringent standards, courts may recharacterize such motions in order to avoid unnecessary dismissal or inappropriately stringent application of formal labeling requirements).

any concrete and particular injury-in-fact that they have suffered apart from their race generally.

Further, Plaintiffs' Complaint is devoid of any allegations that any specific conduct of the Defendants was a cause of the continuing injuries of which Plaintiffs complain. Such wide-ranging social ills are not even alleged "to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. Plaintiffs' allegations of abstract stigmatic injury are not cognizable absent specific allegations of conduct on behalf of the Defendants that has been directed at Plaintiffs or their ancestors. *Cf. Allen*, 468 U.S. at 755-56, 104 S.Ct. 3315.

(c). Miscellaneous Injury

Lastly, Plaintiffs allege injury, in their status as consumers of the Defendants, through being misled, confused, and deceived about the roles the Defendants played in the enslavement of African peoples, as a result of Defendants' public communications. *See* SCAC, ¶ 104. Plaintiffs also allege harm through the Defendants' "intentional misrepresentations" relating to their involvement in securing profits from slavery. *See id.* ¶ 227. These alleged injuries relate to causes of action pled in Plaintiffs' Complaint as violations of various state consumer protection laws. *See id.* Counts VII-XIII. Plaintiffs argue that their allegations that Defendants have violated these State consumer protection laws are sufficient to confer them standing to pursue these claims. *See* Mem. in Opp. to Defs.' Mot. to Dismiss II, § IV. Further, Plaintiffs argue that some of these statutes do not

even require that an injury be alleged, and therefore their standing to pursue these claims is a given. *See* Mem. in Opp. to Defs.' Mot. to Dismiss I, at 11.

This argument misses the mark. The assertion that a state statute dispenses with the requirement that an injury be alleged does not, and cannot, abrogate constitutional limitations imposed by Article III that a personal injury-in-fact is a prerequisite for standing to sue in a federal court. *See, e.g., Burford v. Sun Oil Co.*, 319 U.S. 315, 317, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) (holding that state legislatures may not expand the jurisdiction of the federal district courts); *see also Rifkin v. Bear Stearns & Co., Inc.*, 248 F.3d 628, 631 (7th Cir.2001) (same). These constitutional limitations on standing cannot be altered by either state or federal law. *See Gladstone, Realtors*, 441 U.S. at 100, 99 S.Ct. 1601 (holding that Congress may not abrogate the constitutional limitations on standing); *Watson v. Tarpley*, 59 U.S. 517, 520, 18 How. 517, 15 L.Ed. 509 (1855) (holding that "[state] laws cannot affect, either by enlargement or diminution, the jurisdiction of the courts of the United States as vested and prescribed by the constitution and laws of the United States"); *see also* U.S. Const. art. VI, cl. 2 (Supremacy Clause). Further, Plaintiffs cannot use their standing to pursue one type of claim in a State court in order to establish their standing to pursue all of the claims asserted in the present case in a federal court. "The plaintiffs must establish the district court's jurisdiction over each of their claims independently; they are not permitted to use one count of their complaint to establish federal subject matter jurisdiction and a separate count to establish standing." *Rifkin*, 248 F.3d at 634.

Moreover, these injuries alleged in Plaintiffs' status as consumers of Defendants do not establish a legally cognizable injury. Aside from alleging a general state of confusion, the Plaintiffs fail to allege any injury-in-fact that has come about as a result of that confusion. "The injury alleged must be . . . distinct and palpable, and not abstract or conjectural or hypothetical." *See Allen*, 468 U.S. at 751, 104 S.Ct. 3315 (citations omitted). Additionally, "in ruling on standing, it is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast*, 392 U.S. at 102, 88 S.Ct. 1942. "Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power." *Id.*

Plaintiffs allege that "defendants are engaging in continued intentional misrepresentations and deceptive statements to the consuming public about their roles in the enslavement of Africans. They are unjustly enriched by these commercial acts and omissions. . . ." SCAC, ¶ 227. Plaintiffs fail to allege that Defendants have any cognizable duty to reveal any such information, nor do Plaintiffs allege any concomitant right to obtain such information. Moreover, Plaintiffs make this conclusory statement without any specific factual allegations in support of it. Plaintiffs offer unsupported conclusions wrapped in legally significant terms, such as "intentional misrepresentation" and "unjust enrichment," which are insufficient to establish standing. "The requirements of Article III are not satisfied merely because a party requests a court of the United States to declare

its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process." *Valley Forge*, 454 U.S. at 471, 102 S.Ct. 752. Again, more than "unadorned speculation" and conclusory allegations are required to establish standing. *See Simon*, 426 U.S. at 43-44, 96 S.Ct. 1917.

(d). Conclusion

In response to all these deficiencies, Plaintiffs argue that " '[s]tanding can be supported by a very slender reed of injury.' " Mem. in Opp. to Defs.' Mot. to Dismiss I, at 4 (citing 13 Charles Allen Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531.4 (2d ed.1984)). Plaintiffs are correct that standing can be supported by a very slender reed of injury, as the cases which they cite provide. Yet, this "slender reed" must still have its roots in the soil of an injury personal to the Plaintiffs, not a "derivative harm" uprooted from the soil of another's injury.

Plaintiffs wish to litigate the issue of slavery without establishing that they have suffered some concrete and particularized injury as a result of the putatively illegal conduct of the Defendants. *See Valley Forge*, 454 U.S. at 472, 102 S.Ct. 752; *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. However, "[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast*, 392 U.S. at 99, 88 S.Ct. 1942. "In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper

party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Id.* at 99-100, 88 S.Ct. 1942. Plaintiffs cannot satisfy the first and most basic requirement of constitutional standing—a concrete and particularized personal injury. *See Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. Plaintiffs cannot establish a personal injury sufficient to confer standing by merely alleging some genealogical relationship to African-Americans held in slavery over one-hundred, two-hundred, or three-hundred years ago. In attempting to litigate the unopposed issue of slavery rather than their personal injuries, Plaintiffs also cannot satisfy the second requirement of constitutional standing—injury that is fairly traceable to the conduct of the defendants. *See id.* Plaintiffs do not allege that they had any present property interest that was injured as a result of these specific Defendants' actions, nor that any action of the Defendants wronged them in any way that would be cognizable under tort theory. Plaintiffs fail to allege any conduct by the seventeen specifically named Defendants that individually affected any of the Plaintiffs.

In sum, the allegations of Plaintiffs' Complaint fail to support their standing to maintain this suit, as required by Article III of the United States Constitution.

(2). Prudential Limitations on Standing

Beyond the constitutional limitations on the standing doctrine, there are prudential limitations on the exercise of federal court jurisdiction. *See, e.g., Warth*, 422 U.S. at 498, 95 S.Ct. 2197. These additional prudential limitations on standing may exist even though the Article III requirements

are met because "the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone, Realtors*, 441 U.S. at 99-100, 99 S.Ct. 1601. Like the constitutional limitations on the standing doctrine, these prudential limitations ensure that federal courts adhere to the separation of powers concept and are "founded in concern about the proper, and properly limited, role of the courts in a democratic society." *Warth*, 422 U.S. at 498, 95 S.Ct. 2197. However, "unlike their constitutional counterparts, they can be modified or abrogated by Congress." *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997).

One of these prudential limits on standing is that a litigant must normally assert his own legal interests rather than those of third parties. *See Singleton v. Wulff*, 428 U.S. 106, 113-14, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *Warth*, 422 U.S. at 499, 95 S.Ct. 2197. Another is that the federal courts should "refrain[ ] from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge*, 454 U.S. at 475, 102 S.Ct. 752 (citing *Warth*, 422 U.S. at 499-500, 95 S.Ct. 2197).

(a). Plaintiffs Impermissibly Attempt to Assert the Legal Rights of Absent Third Parties

As a general rule, a litigant must assert his own legal rights and cannot assert the legal rights of a third-party. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 410, 111 S.Ct. 1364, 113

L.Ed.2d 411 (1991); *Singleton*, 428 U.S. at 113-14, 96 S.Ct. 2868. However, a litigant may assert the rights of absent third-parties in certain limited situations. In determining whether a litigant who seeks standing to assert the legal rights of a third-party may do so, a two-part inquiry is involved. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n. 3, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989). First, the litigant must have personally suffered some injury-in-fact adequate to satisfy Article III's case or controversy requirement. *See id.; see also Singleton*, 428 U.S. at 112, 96 S.Ct. 2868. Second, certain prudential considerations must point in favor of permitting the litigant to assert the third-party's legal rights. *See Caplin*, 491 U.S. at 623 n. 3, 109 S.Ct. 2646. Among the prudential considerations to consider are the requirements that the litigant must have a legally sufficient relation to the third-party, *see Powers*, 499 U.S. at 411, 111 S.Ct. 1364; *see also Craig v. Boren*, 429 U.S. 190, 196, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), and there must exist some hindrance to the third-party's ability to protect his or her own rights. *See Powers*, 499 U.S. at 411, 111 S.Ct. 1364; *see also Singleton*, 428 U.S. at 115-116, 96 S.Ct. 2868.

To the extent that Plaintiffs are attempting to assert the legal rights of their ancestors, Plaintiffs cannot do so because they themselves have failed to establish that they have personally suffered some injury-in-fact adequate to satisfy Article III's case-or-controversy requirement. *See Singleton*, 428 U.S. at 112, 96 S.Ct. 2868. In addition, prudential considerations militate against allowing such claims. First, Plaintiffs have not alleged a legally sufficient relation to their ancestors. All that Plaintiffs allege is a genealogical relationship, and more is required under the law in order to

confer third-party standing. *Cf. Gilmore v. Utah*, 429 U.S. 1012, 1016-17, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976) (indicating that a mother had no standing to contest her son's execution). Plaintiffs make no allegations of any relationship sufficient, whether by common law or statute, to confer them standing to pursue the claims of their deceased ancestors. *Cf. Whitmore v. Arkansas*, 495 U.S. 149, 163, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (recognizing a next-friend's standing to sue in certain situations); *United Food & Comm. Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 558, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996) (recognizing that the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq., grants unions standing to sue on behalf of its members). Furthermore, Plaintiffs do not allege that they are assignees of a legally cognizable claim against the named Defendants. Second, Plaintiffs have not alleged that any hindrance existed to their ancestors' ability to have protected their own rights over the last century. *Cf. Johnson v. McAdoo*, 45 App.D.C. 440, 441 (1916), *aff'd*, 244 U.S. 643, 37 S.Ct. 649, 61 L.Ed. 1367 (1917) (evidencing a claim for slavery-based reparations nearly a century ago).

In sum, Plaintiffs have not established third-party standing to assert the legal rights of their ancestors.

(b). Plaintiffs Impermissibly Attempt to Litigate a Generalized Grievance Which is Best Addressed in the Representative Branches

As currently framed, Plaintiffs' Complaint seeks to litigate a generalized grievance over one of the most horrific chapters of our Nation's history rather than a personal dispute,

which the federal courts are able to adjudicate. For the reasons stated in the following section, such an "abstract question[ ] of wide public significance" should be left to the representative branches of our system of government. *See Valley Forge*, 454 U.S. at 475, 102 S.Ct. 752.

2. The Political Question Doctrine

Defendants also argue that the court should dismiss Plaintiffs' Complaint because the issue of reparations to former slaves presents a non-justiciable political question. *See* Mem. in Supp. of Defs.' Mot. to Dismiss II, at 3. Although the court has dispositively determined that Plaintiffs lack standing to bring the claims raised in their Complaint, with an abundance of caution, the court will next determine whether the political question doctrine provides an independent basis for dismissal.

a. Overview of the Political Question Doctrine

It is well-established that the federal courts will not adjudicate questions that fall within the purview of the political question doctrine. *See Baker v. Carr*, 369 U.S. 186, 210, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Like standing, mootness and ripeness, the political question doctrine is a justiciability limitation with its prudential roots dating back to the 18th century. *See, e.g., Hayburn's Case*, 2 U.S. 408 (2 Dall. 409), 410, 1 L.Ed. 436 (1792) (invalidating a statute authorizing the Executive branch to accept or reject federal court determinations of pension eligibility for Revolutionary War veterans); *Marbury*, 5 U.S. (1 Cranch) at 170 ("Questions, in their nature political, or which are, by the

constitution and laws, submitted to the executive, can never be made in this court."). The political question doctrine restricts judicial review that might interfere with other branches of the federal government. *See McIntyre v. Fallahay*, 766 F.2d 1078, 1081 (7th Cir.1985). Even in cases where the federal court has subject matter jurisdiction, it could choose not to exercise its jurisdiction to avoid interfering with decisions previously made by the Executive or Legislative branches (hereinafter the "Representative Branches"). *See United States v. Munoz-Flores*, 495 U.S. 385, 393-94, 110 S.Ct. 1964, 109 L.Ed.2d 384 (1990). When the court reaches this conclusion, the question becomes non-justiciable-meaning not appropriate for judicial review. The non-justiciability of a political question is based primarily on the constitutional principle of separation of powers inherent in the text of the Constitution and the policy of judicial self-restraint. *See Baker*, 369 U.S. at 210, 82 S.Ct. 691; *see also Kashani v. Nelson*, 793 F.2d 818, 827 (7th Cir.1986); *Flynn v. Shultz*, 748 F.2d 1186, 1189 (7th Cir.1984); *Calvin v. Conlisk*, 520 F.2d 1, 5 (7th Cir.1975). Although the political question doctrine is just one aspect of a broader justiciability issue, it has been "applied in cases involving extremely diverse issues." *Flynn*, 748 F.2d at 1189; *see also Baker*, 369 U.S. at 211-18, 82 S.Ct. 691.

However, not all issues having political implications or significant political overtones are non-justiciable under the political question doctrine. *See Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 229-30, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986); *see also I.N.S. v. Chadha*, 462 U.S. 919, 921, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). Rather the Supreme Court has said that " '[i]n determining whether

a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.' " *Baker*, 369 U.S. at 210, 82 S.Ct. 691 (quoting *Coleman v. Miller*, 307 U.S. 433, 454-55, 59 S.Ct. 972, 83 L.Ed. 1385 (1939)). To further frame the issue, the Supreme Court has identified at least six factors ("*Baker* factors") the court should consider to determine whether a matter raises a non-justiciable political question, including:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217, 82 S.Ct. 691; *see also Kashani*, 793 F.2d at 827. When any one of the foregoing *Baker* factors is implicated, the court should refrain from adjudicating the issue to prevent unwarranted interference with decisions properly made by the Representative Branches of the federal

government. *See Munoz-Flores*, 495 U.S. at 393-94, 110 S.Ct. 1964; *Baker*, 369 U.S. at 217, 82 S.Ct. 691.

Following *Baker*, the Supreme Court "has not retreated from the analytical framework it established." *Alperin v. Vatican Bank*, 410 F.3d 532, 535 (9th Cir.2005) (holding that dismissal of victims of World War II war crimes Complaint was not warranted because the court could resolve property claims without expressing lack of respect for federal government's political branches). Other recent decisions have elaborated on the *Baker* criteria. Last Term, the Supreme Court revisited the *Baker* decision, stating that the factors enumerated in that case are "probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (holding that political gerrymandering claims are nonjusticiable). After *Vieth*, courts have taken a "slightly different approach to interpreting the phrase 'judicially discoverable and manageable standards.'" *Alperin*, 410 F.3d at 553. "Instead of focusing on the logistical obstacles, we ask whether the courts are capable of granting relief in a reasoned fashion or, on the other hand, whether allowing the . . . [c]laims to go forward would merely provide 'hope' without a substantive legal basis for a ruling." *Id.* (citing *Vieth*, 541 U.S. at 304, 124 S.Ct. 1769).

b. Application of the Political Question Doctrine

Before determining whether any of the *Baker* factors require dismissal under the political question doctrine, the court must first decide the applicability of the political question doctrine based on the nature of Plaintiffs' claims.

Appendix B

Plaintiffs argue that the political question doctrine is inapplicable here because their claims are *private*, not *political. See* Mem. in Opp. to Defs.' Mot. to Dismiss I, at 25 (emphasis added); *see also* Mem. in Opp. to Defs.' Mot. to Dismiss II, at 4. Specifically, Plaintiffs assert that the doctrine does not apply because their "claims are brought by private individuals against private corporations for both tort and property harms that were occasioned by defendants' particular acts of years past, as well as their acts of today."[26] Mem. in Opp. to Defs.'s Mot. to Dismiss I, at 25. The court rejects Plaintiffs' argument for two reasons. First, there are numerous cases where the federal courts have dismissed claims by private plaintiffs against private defendants on the basis of the political question doctrine. The majority of these cases arise in the context of reparations claims arising out of

26. In support of their position, Plaintiffs rely on *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir.1995), a case which is clearly distinguishable from the present case. In *Kadic*, the Second Circuit declined to dismiss the plaintiffs' claims under the Alien Tort Claims Act alleging gross human rights abuses against a Bosnian Serb leader on the basis of the political question doctrine. 70 F.3d at 250. The *Kadic* court cautioned that "judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions . . ." and added that "[a]lthough these cases present issues that arise in a politically charged context, that does not transform them into cases involving non-justiciable political questions." *Id.* at 249. However, in reaching its decision, the *Kadic* court stated that it did not have to decide the issue of whether judicial involvement would interfere with actions of other branches of the federal government because the court obtained a " 'Statement of Interest' " signed by both the Solicitor General and the State Department's Legal Advisor expressly disclaiming any concern that the political question doctrine should be invoked. *Id.* at 250. No such "Statement of Interest" has been or could be sought in the present case.

World War II. *See, e.g., Kelberine v. Societe Internationale*, 363 F.2d 989, 995 (D.C.Cir.1966); *In re Nazi Era Cases Against German Defendants Litig.*, 129 F.Supp.2d 370, 382 (D.N.J.2001); *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424, 489 (D.N.J.1999); *Burger-Fischer v. Degussa AG*, 65 F.Supp.2d 248, 282-85 (D.N.J.1999).

Second, although Plaintiffs couch their claims as *tort* or *property* claims for acts committed by *private* corporate defendants, this alone does not preclude the application of the political question doctrine. The Supreme Court has stated that the identity of the litigants is immaterial to the questions raised by the political question doctrine. *See Munoz-Flores*, 495 U.S. at 394, 110 S.Ct. 1964. Additionally, when determining whether the political question doctrine applies, the court must look to the nature of the underlying litigation, not the specific claims enumerated in the complaint. *See Renne*, 501 U.S. at 316, 111 S.Ct. 2331 (to determine justiciability, the court must examine the "pleadings and record to determine the nature of the dispute and the interests of the parties in having [the issue] resolved"); *see also Baker*, 369 U.S. at 217, 82 S.Ct. 691 (indicating the need for a "discriminating inquiry into the precise facts and posture of the particular case" when distinguishing between "political questions" and "political cases"). Thus, the issue becomes whether Plaintiffs' claims are the type of claims that have been committed to the Representative Branches for resolution. *See In re Nazi Era Cases Against German Defendants Litig.*, 129 F.Supp.2d at 378.

Finally, Plaintiffs assert that the issue of reparations is a distinct and separate issue from issues of "[e]quality under

the law and freedom from discrimination." Mem. in Opp. to Defs.' Mot. to Dismiss II, at 4. In other words, Plaintiffs argue that the legislation Congress has passed granting African-Americans full citizenship and equality under the law does not amount to, or serve as a substitute for, legitimate and meaningful reparations for slavery. *Id.* Plaintiffs therefore argue that the political question doctrine does not apply to the issue of slave reparations. *Id.* at 4-5. It is clear, however, that Congress has considered the issues of reparations for slavery numerous times, in contexts distinct from that of equal rights under the law. *See, e.g.*, H.R. 40, 108th Cong. (2003) and H.R. 40, 107th Cong. (2001) (proposing a Congressional committee to study the effects of slavery on the present African-American community); An Act to Establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, 13 Stat. 507 (March 3, 1865) (creating the Freedman's Bureau, which was to provide former slaves with, *inter alia*, food, clothing, and job placement); H.R. 29, 40th Cong. § 1, 2 (1867) (proposing that Confederate property be seized and distributed to former slaves).

Plaintiffs' Complaint indicates that the underlying nature of their lawsuit seeks reparations for Defendants' participation in slavery dating back as far as the year 1619. *See* SCAC, ¶ 5. Although Plaintiffs request both equitable and legal relief, the bulk of this relief centers on Plaintiffs' claim for restitution. For example, Plaintiffs seek, among other things, the following remedies: (1) an accounting of the "monies, profits, and/or benefits derived by defendants" from the slave trade and slavery; (2) "a constructive trust in the value of said monies, profits, and/or benefits," (3) "full restitution in the value of all monies, profits, and/or benefits

derived by defendants' use of slave labor," (4) "equitable disgorgement" of these "monies, profits, and/or benefits," and (5) any other appropriate damages. *See id.* ¶¶ 288, Prayer for Relief. These remedies collectively provide the basis for calculating and distributing the amount of restitution sought; that is the amount in which Plaintiffs claim that Defendants wrongfully benefitted from Plaintiffs' ancestors' unpaid slave labor. *See United States v. Shepard*, 269 F.3d 884, 885 (7th Cir.2001) (defining restitution as usually meaning the return of ill-gotten gains to which the holder is not legally entitled). Courts have consistently held that claims seeking restitution for forced labor are claims for reparations. *See Iwanowa*, 67 F.Supp.2d at 485 n. 84; *see also Burger-Fischer*, 65 F.Supp.2d at 281-82. Such claims clearly raise a question as to whether the Judicial branch of the federal government is best suited to resolve the issue. *See Cato*, 70 F.3d at 1110 (holding that plaintiffs' claims for slavery reparations presented a non-justiciable political question); *see also Kelberine*, 363 F.2d at 995 (concluding that plaintiffs' claims for reparations against private corporate defendant for its involvement in a "Nazi Conspiracy" during World War II were barred by political question doctrine).

To further support this conclusion, in a recent action seeking relief from a German company and its American subsidiaries for damages resulting from the plaintiffs' forced labor in Nazi Germany during World War II, the District Court for the District of New Jersey rejected the very same argument that Plaintiffs raise here. *See In re Nazi Era Cases Against German Defendants Litig.*, 129 F.Supp.2d at 375 (rejecting the plaintiffs' argument that the political question doctrine cannot preclude a claim for reparations brought by an

individual against a private company when the underlying abuse alleged was "fundamentally interrelated with the Nazi war effort").

As a result, Plaintiffs' assertions that their claims are *private* rather than *political*, and that the issue of reparations is different from the issue of equal rights under the law, do not preclude the court from inquiring into whether this case presents a non-justiciable political question. Further, given the nature of Plaintiffs' claims, an analysis of the political question doctrine is necessary. Having reached this conclusion, a review of Plaintiffs' Complaint reveals that all of the *Baker* factors are present in the underlying litigation.

(1). A Textually Demonstrable Constitutional Commitment of the Issue to a Coordinate Political Department

The Constitution commits to the Representative Branches of the United States Government the authority to resolve the issue of reparations to former slaves resulting from the Nation's role in the institution of slavery. As stated above, historians have long debated whether the issue of slavery was the actual cause of the Civil War. *See infra*, Part II.E. However, regardless of what actually caused the Civil War, it is clear that the abolition of slavery as an institution was a fundamental concern of the Representative Branches both during and after the war. *See, e.g.*, Donald G. Nieman, *Promises to Keep: African-Americans and the Constitutional Order, 1776 to the Present* 54 (Oxford University Press 1991). Under the Constitution, the war powers are reserved to the Representative Branches of the federal government.

See U.S. Const. art. I, § 8; U.S. Const. art. II, § 2; *see also Doe v. Bush*, 323 F.3d 133, 137 (1st Cir.2003). These powers not only include the power to declare and prosecute war, but also extend to the power to ensure a just and lasting peace following the conclusion of a war. *See Ladue & Co. v. Brownell*, 220 F.2d 468, 472 (7th Cir.1955) (holding that Congress may reserve the power to seize property following a formal declaration of peace). By exclusively entrusting such powers to the Representative Branches, the Constitution restricts judicial review or interference on many war-related decisions made by Congress and the President both during and after a war. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 589-90, 72 S.Ct. 512, 96 L.Ed. 586 (1952).

In this case, there is a strong historical record indicating that the relief sought, reparations to former slaves following the Civil War, was considered and rejected by the Representative Branches in lieu of other forms of relief. This relief came in many forms, including wartime and post-war legislation, civil rights legislation, and constitutional amendments—all intended to ensure the liberty of the newly freed slaves and benefit them generally.

For example, prior to the end of the Civil War, Congress passed the Federal Confiscation Acts designed to punish those who participated in the rebellion by confiscating their property. *See* An Act to Confiscate Property Used for Insurrectionary Purposes, ch. 60, 12 Stat. 319 (Aug. 6, 1861), as amended by, An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes, ch. 195, 12 Stat. 589 (July 17, 1862). The Confiscation Acts also freed tens of thousands

of slaves who had fled to Union forces by the summer of 1862. *See id.* Shortly thereafter, following a series of Union victories, President Lincoln, using his constitutional authority as Commander-in-Chief, issued the Emancipation Proclamation on January 1, 1863. *See* Abraham Lincoln, The Emancipation Proclamation, Exec. Proclamation No. 17 (Jan. 1, 1863), reprinted in 12 Stat. 1268 (1863). The Emancipation Proclamation freed all slaves in the states under Confederate control. *Id.*

Other wartime efforts to ensure the well-being of the newly freed slaves included Congress' creation of the Freedman's Bureau in March 1865. *See* An Act to Establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, 13 Stat. 507 (March 3, 1865). Congress created the Freedman's Bureau pursuant to the war powers to provide former slaves food, clothing, supplies, job placement, educational facilities, and homestead land. *Id.; see also* Albert P. Blaustein and Robert L. Zangrando, *Civil Rights and the American Negro: A Documentary History* 210 (Washington Square Press, Inc., New York 1968). The Bureau had the authority to rent or sell to freed slaves land abandoned or confiscated in the Confederacy. *Id.* Although Congress initially intended for the Bureau's authority to expire one-year after the completion of the Civil War, Congress voted to extend the Bureau's powers over President Johnson's veto. *See* An Act to Continue in Force and to Amend An Act to Establish a Bureau for the Relief of Freedmen and Refugees, and for Other Purposes, ch. 200, 14 Stat. 173 (July 16, 1866); An Act to Continue the Bureau for the Relief of Freedmen and Refugees, and for Other Purposes, ch. 135, 15 Stat. 83 (July 6, 1868); *see also* George R. Bentley, *A History of the Freedmen's Bureau* 133 (Octagon Books 1970) (1955).

Appendix B

Congress also passed numerous Civil Rights Acts between the period of 1866-1875. Specifically, the Civil Rights Acts of 1866, 1870, 1871, and 1875 were enacted to secure civil rights for the newly freed slaves. Most notably, the Civil Rights Act of 1866 declared "[a]ll persons" to be citizens of the United States and guaranteed them legal equality throughout the nation.[27] *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (April 9, 1866). The Act provided that "[a]ll persons . . . shall have the same right in every State . . . as is enjoyed by white citizens." *Id.* § 1 (currently codified, as amended, at 42 U.S.C. § 1981).

Additionally, Congress ratified three constitutional amendments (hereinafter collectively referred to as the "Civil War Amendments") between the period of 1865 to 1870 to ensure the liberty of the newly freed slaves. The Thirteenth Amendment, ratified on December 6, 1865, provides, in part: "Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1. This amendment formally abolished slavery within the United States by prohibiting individual states from enacting legislation authorizing the use of slavery within their borders. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) (noting that the Thirteenth Amendment effectively abolished slavery and gave Congress the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United

27. Because there were questions as to whether the Thirteenth Amendment authorized the Civil Rights Act of 1866, Congress ratified the Fourteenth Amendment on July 9, 1868, rendering the issue moot. *See* U.S. Const. amend XIV.

States") (internal quotations omitted). Congress then ratified the Fourteenth Amendment on July 9, 1868, declaring among other things, that all persons born or naturalized in the United States were United States citizens and citizens of the state in which they resided. *See* U.S. Const. amend. XIV, § 1. Section 1 of this Amendment effectively overruled the Supreme Court's *Dred Scott*[28] decision, ultimately making freed slaves citizens of the United States. Finally, on February 3, 1870, Congress ratified the Fifteenth Amendment with the intention of granting African-Americans the right of suffrage.[29] The Fifteenth Amendment provides, in part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color,

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28. In *Dred Scott v. Sanford*, the Supreme Court declared the Missouri Compromise unconstitutional and broadly held that slaves were property, not citizens. 60 U.S. 393, 15 L.Ed. 691 (1856). The Court's ruling established that slaves were not entitled to all of the rights, privileges and immunities guaranteed to all citizens under the Constitution. *Id.*, 60 U.S. at 404-405.

29. The court notes that although Congress intended to give African-Americans the right to vote by ratifying the Fifteenth Amendment, the Amendment itself did not guarantee such a result. State and local laws requiring poll taxes, literary tests, residence and registration requirements, and "grandfather clauses" acted as impediments to this right. *See* Blaustein and Zangrando, *supra* at 245-46. Many of these issues were not resolved until decades later when the United States Supreme Court became involved in the issue and Congress passed the Voting Acts Rights Act of 1965. *Id.* However, to help illustrate the seriousness of Congress' efforts to assimilate the newly freed slaves into society, the court notes that the African-American male was given the right to vote fifty years prior to Congress' ratification of the Nineteenth Amendment, which gave women the right to vote. *See* U.S. Const. amend. XIX.

or previous condition of servitude." U.S. Const. amend XV, § 1. Concerned with the possibility that individual states may attempt to circumvent the purpose behind the Civil War Amendments, Congress included an enabling clause in all three of the Civil War Amendments-giving it the exclusive power to enforce the Amendments with appropriate legislation. *See* U.S. Const. amend XIII, § 2; *see also* U.S. Const. amend XIV, § 5; U.S. Const. amend XV, § 2.

More directly on point, the Representative Branches considered the issue of reparations to freed slaves for harms suffered as a result of the institution of slavery.[30] Congressman Thaddeus Stevens proposed a bill that would have utilized the Confiscation Acts to seize public and private real property within the former Confederate States. *See* H.R. 29, 40th Cong. § 1, 2 (1867). The confiscated property would have been distributed to freed slaves. *See id.* § 4. Specifically, the text of that bill provided, *inter alia*:

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30. In fact the Representative Branches continue to consider the issue of reparations to descendants of slaves. In 1989, and in each successive year, Congressman John Conyers has introduced a Reparations Study Bill, commonly referred to as H.R. 40. *See, e.g.*, Commission to Study Reparations Proposals for African Americans Act, H.R. 3745, 101st Cong. (1989); Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 108th Cong. (2003). This Reparations Study Bill provides, *inter alia*, for the formation of a commission to study human chattel slavery and its continuing impact on African descendants in the United States today. *See, e.g.*, H.R. 3745, § 2(b)(1)-(3), 101st Cong. (1989). The bill also calls for the commission to recommend the form that reparations should take if it indeed finds there to be continuing injuries to African descendants. *See id.* at § 2(b)(5).

> That out of the lands thus seized and confiscated the slaves who have been liberated by the operations of the war and the amendment to the Constitution or otherwise, who reside in said "confederate States" on the 4th day of March, A.D. 1861, or since, shall have distributed to them as follows, namely: to each male person who is the head of a family, forty acres; to each adult male, whether the head of a family or not, forty acres; to each widow who is the head of a family, forty acres—to be held by them in fee—simple, but to be inalienable for the next ten years after they come seized thereof.

Id. In addition, each freed slave would have also been entitled to a monetary grant for the purpose of erecting buildings on these distributed lands. *See id.* § 5.

Stevens passionately advocated for passage of this bill. Stevens indicated that H.R. 29 was designed to help several classes of persons, including freed slaves, stating:

> [H.R. 29] is important to four millions of injured, oppressed, and helpless men, whose ancestors for two centuries have been held in bondage and compelled to earn the very property a small portion of which we propose to restore to them, and who are now destitute, helpless, and exposed to want and starvation under the deliberate cruelty of their former masters. . . . The cause of the war was slavery. We have liberated the slaves. It is our duty to protect them and provide for them

> while they are unable to provide for themselves. Have we not a right, in the language of Vattel, "to do ourselves justice respecting the object which has caused the war," by taking lands for homesteads for these "objects" of the war?

Cong. Globe, 40th Cong., 1st Sess. 204 (1867) (statement of Congressman Stevens). According to Stevens, passage of H.R. 29 would have served two objectives. First, the bill would have served to punish the Confederate States for their treasonous war. As Stevens stated: "You behold at your feet a conquered foe, an atrocious enemy. Tell him on what terms he may arise and depart or remain loyal. But do not embrace him too hastily. Be sure first that there is no dagger in his girdle." *Id.* at 205. Second, the bill would have served to place freed slaves on the path to economic independence. As Stevens stated:

> Four million persons have just been freed from a condition of dependence, wholly unacquainted with business transactions, kept systematically in ignorance of all their rights and of the common elements of education, without which none of any race are competent to earn an honest living, to guard against the frauds which will always be practiced on the ignorant, or to judge of the most judicious manner of applying their labor.

Id.

In the Senate, Senator Charles Sumner also championed this vision of land distribution as a form of reparations to

freed slaves. *See* Cong. Globe, 40th Cong., 1st Sess. 15, 49-56, 79, 114, 147, 203-08, 304-08, 463 (1867) (statements of Senator Sumner). According to Sumner, "all who are now familiar with the process of reconstruction have felt that our work would be incomplete unless in some way or another we secured to the freedmen a piece of land." Cong. Globe, 40th Cong., 1st Sess. 50 (1867) (statement of Senator Sumner). One particular proposed resolution of Sumner's provided, *inter alia*: "Not less important than education is the homestead, which must be secured to the freedmen, so that at least every head of a family may have a piece of land." *Id.* (reading text of proposed resolution, Miscellaneous Document No. 1, § 5).

The idea of land distribution was also a plan of the Bureau of Refugees, Freedmen, and Abandoned Land. *See generally* Bentley, *supra* at 49. However, the idea of land distribution was ultimately abandoned, with President Andrew Johnson pursuing a plan to pardon Confederate sympathizers and restore their property rights. *See* Claude F. Oubre, *Forty Acres and a Mule: The Freedmen's Bureau and Black Land Ownership* 61-71 (1978).

The words of Senator Sumner, lamenting the decision not to extend monetary or property reparations to freed slaves, is hauntingly prophetic of the continued post-Emancipation reparations movement: "I do not like to play the part of Cassandra; [31] but I cannot forbear declaring my conviction that we shall regret hereafter that we have not done more." Cong. Globe, 40th Cong., 1st Sess. 165 (1867) (statement of

31. In Greek mythology, Cassandra was a figure endowed with the gift of prophecy but fated never to be believed.

Senator Sumner). Yet, that does not change the fact that the Representative Branches considered the issue of reparations to former slaves, and the chosen vessels of reparations came in the form of constitutional and legislative enactments guaranteeing equality under the law and freedom from discrimination. It is the political question doctrine that militates that this court attribute finality to those decisions, and not posit itself as the ultimate authority on the issue by second guessing those decisions. *See Baker*, 369 U.S. at 210, 82 S.Ct. 691. It is not the province of this court to say that more could have been done in the past, as such decisions are in the nature of political questions committed to the Representative Branches.

In conclusion, based on the historical record presented here, it is clear that both during and after the Civil War the issue of reparations to former slaves was one committed to the Representative Branches of the federal government. It was the President and Congress who prosecuted the military and political aspects of the Civil War, ultimately leading to the conclusion of the war. With a goal of preserving the Union and securing an acceptable and lasting peace, it again was the President and Congress who chose to amend the Constitution and enact civil rights legislation in an effort to provide legal equality to the newly freed slaves. Although the Representative Branches decided to take this particular course of conduct in lieu of providing reparations to former slaves, the historical record clearly demonstrates that the Constitution commits this decision to the Representative Branches. *See Alperin v. Vatican Bank*, 242 F.Supp.2d 686, 692 (N.D.Cal.2003) (noting that "a court must consider the totality of the circumstances in determining whether a claim

is one committed to the political branches for resolution"). By requiring the court to second-guess the decisions of the Representative Branches made more than a century ago, Plaintiffs' Complaint presents a non-justiciable political question. *See Cato*, 70 F.3d at 1110 (affirming the dismissal of plaintiffs' slavery reparations complaint on political question grounds based on Congress' desire "to prevent judicial second guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort") (internal quotations and citations omitted).

(2). Judicially Discoverable and Manageable Standards

There also exists a lack of "judicially discoverable and manageable standards" for resolving Plaintiffs' claims in this case. *Baker*, 369 U.S. at 217, 82 S.Ct. 691. Defendants argue, and the court agrees, that the historical issues raised in Plaintiffs' Complaint "involve too broad a span of conduct over too broad an expanse of time to be susceptible to any manageable judicial standards for resolution." *See* Mem. in Supp. of Defs.' Mot. to Dismiss I, at 35; Mem. in Supp. of Defs.' Mot. to Dismiss II, at 3. As stated in the Complaint, the relevant events took place as far back as the year 1619. *See* SCAC, ¶ 5. Absent a political framework, the court is ill-equipped to determine many issues posed in a dispute covering a period of almost 400 years. This includes, for example, determining such issues as consanguinity and apportionment of liability given the multiple generations associated with the litigation. *See, e.g.*, Eric A. Posner and Adrian Vermeule, *Reparations For Slavery and Other*

Historical Injustices, 103 Colum. L.Rev.. 689, 702 (2003) (discussing the limited effect of the restitutionary theory of reparations where the claim is made several generations removed from the actual wrongdoing).

In support of their claims, Plaintiffs rely on *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139 (E.D.N.Y.2000), to support their assertion that this type of case is "extremely well suited to judicial resolutions." *See* Mem. in Opp. to Defs.' Mot. to Dismiss I, at 30 n.47; *see also* Mem. in Opp. to Defs.' Mot. to Dismiss II, at 1. In the *Holocaust Victim* case, the district court approved a class action settlement between Holocaust victims and two leading Swiss banks after the plaintiffs brought suit alleging, among other things, that the defendants "collaborated with and aided the Nazi regime in furtherance of war crimes, crimes against humanity, crimes against peace, slave labor and genocide." 105 F.Supp.2d at 141. However, the *Holocaust Victim* case is clearly distinguishable from the present action because in its Opinion, the court noted that because the settlement was reached while the defendants' motions to dismiss were pending, the court did not have to decide the issues raised in the motions. *Id.* at 142. Thus, the *Holocaust Victim* court never considered whether the issues raised in the plaintiffs' complaint implicated a non-justiciable political question.

Moreover, although it can be argued that in certain cases such issues similar to those presented in Plaintiffs' Complaint are not entirely inappropriate for judicial resolution, this case does not present such issues. Because the events surrounding the institution of slavery and the Civil War are so deeply rooted in our Nation's history, the issues that may appear to

be capable of judicial resolution in an ordinary case move beyond the province of this court given the magnitude of the events that preceded them. *Cf. Nazi Era Cases Against German Defendants Litig.*, 129 F.Supp.2d at 389 (stating that the magnitude of World War II has placed plaintiffs' claims for reparations beyond the province of judicial determination and "into the political realm").

Ultimately, the court is persuaded by the reasoning adopted by other courts that have considered the issue in the context of reparations for forced labor during World War II and have held that such claims are not suitable for judicial resolution. *See, e.g., Kelberine*, 363 F.2d at 995; *Iwanowa*, 67 F.Supp.2d at 489; *Burger-Fischer*, 65 F.Supp.2d at 283-84; *Alperin*, 242 F.Supp.2d at 695; *Anderman v. Federal Republic of Austria*, 256 F.Supp.2d 1098, 1115 (C.D.Cal. 2003). In *Kelberine*, while discussing whether a private corporation should be liable for its involvement in the Nazi conspiracy of 1933-45, the Appeals Court for the D.C. Circuit stated:

> We are of the opinion the thesis is not presently susceptible of judicial implementation. It may be that the Congress might enact a program and a procedure by which the objectives prayed for could be achieved. But we think the courts alone cannot do it. As presently framed, the problem is not within the established scope of judicial authority. . . . The span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tortfeasors is too

> indefinite. The procedure sought—adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power—is too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed. . . . The events, the witnesses, the guilty tortfeasors, their membership in the conspiracy are all so potentially vague at this point as to pose an insoluble problem if undertaken by the courts without legislative or executive guidance, authorization or support. The whole concept is too uncertain of legal validity to sustain the self-establishment of the proceedings by a court in the absence of specific legislative or executive formulation.

Kelberine, 363 F.2d at 995.

The issues raised by the *Kelberine* court, particularly those relating to the impracticality of judicially resolving disputes covering vast time periods and containing numerous unidentifiable tortfeasors, are clearly present in the underlying litigation. Although Plaintiffs attempt to distinguish the World War II reparation cases from their case, many of the issues raised in *Kelberine* and its progeny are plentiful in the underlying litigation. As such, the second *Baker* factor also requires dismissal of Plaintiffs' Complaint.

Appendix B

(3). Remaining Baker Factors

As stated above, the issues raised in Plaintiffs' Complaint involve events that have had a significant impact on our Nation's historical development. *See infra* Part II. Both during and after the Civil War, the Representative Branches implemented various policies aimed at resolving the problems and challenges stemming from the abolition of slavery within the United States. These policies included, among others, the enactment of several Civil Rights Acts and the ratification of the Civil War Amendments—all of which were intended to provide legal equality to the newly freed slaves. Even throughout the twentieth century, the Representative Branches continued to establish these policies by enacting further civil rights legislation and by implementing various relief programs intended to benefit minorities—many of whom are descendants of former slaves.

By bringing their claims for slavery reparations before the court, Plaintiffs require the court to criticize or question actions or decisions or policies made by the Representative Branches over a period spanning more than a century. Given our constitutional structure, policy determinations of this type are for elected officials, not the courts. Moreover, during and after the bloodiest war in this country's history, the Representative Branches grappled with these issues while simultaneously trying to conclude the war and ensure lasting peace. Allowing Plaintiffs, through private litigation, to seek reparations for wrongs committed prior to and during the Civil War clearly expresses a lack of respect for the Representative Branches and their attempted resolution of

such issues over the past century and one-half.[32] Although Plaintiffs question the choices made by the Representative Branches and the effectiveness of these decisions in providing equality to descendants of former slaves, the fact remains that these are political questions which the court must decline to determine. *Cf. Burger-Fischer*, 65 F.Supp.2d at 282 (concluding that courts cannot re-examine the adequacy of reparation agreements between the United States and other World War II combatants because doing so implicates a political question in which the court must decline to intervene).

(4) Efficiency and Legitimacy

Principles of efficiency and legitimacy also play an important role in the political question doctrine. Prudential limits on the exercise of power protect the separate branches of government from the potential embarrassment of being unnecessarily overruled by one another, and from the inherent waste that would result from one branch conducting the

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32. Plaintiffs argue that President Bush recently gave "implicit support" for their claims in a major policy speech given on Goree Island in Senegal on July 8, 2003, where he declared that slavery was "one of the greatest crimes in history." *See* Mem. in Opp. to Defs.' Mot. to Dismiss I, at 31; Mem. in Opp. to Defs.' Mot. to Dismiss II, at 1. Plaintiffs fail to develop this argument or support it in any way. *See United States v. Jones*, 224 F.3d 621, 626 (7th Cir.2000) (stating that courts should not consider undeveloped or unsupported arguments). In any event, Plaintiffs' use of the President's speech is not persuasive because such statements may support the proposition that the Representative branches of our government should continue their historical efforts to advance civil rights for all citizens.

business of another. *See Baker*, 369 U.S. at 210, 82 S.Ct. 691. The drafters of the Constitution understood that various branches of our federal government would be better equipped, more knowledgeable, and have greater resources to deal with certain specific matters than other branches. *See Saldano v. O'Connell*, 322 F.3d 365, 369 (5th Cir.2003).

For example, the drafters assigned the judicial branch a very small role in the arena of foreign relations. *See United States v. Plummer*, 221 F.3d 1298, 1309 (11th Cir.2000) ("the role of the judiciary in foreign affairs is limited: 'Matters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference'") (quoting *Regan v. Wald*, 468 U.S. 222, 242, 104 S.Ct. 3026, 82 L.Ed.2d 171 (1984)). Issues related to foreign affairs are thus best left to Congress, as it has the resources and tools necessary to handle foreign policy issues. The House or Senate thus has the power to convene hearings or conduct investigations in any foreign relations area. To allow judicial intervention in foreign policy areas that are designated to the Representative branch would be an ineffective allocation of resources, and render the Congressional role in foreign policy moot. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235 (11th Cir.2004).

c. Conclusion

The federal court system is insulated from the political process by, in part, granting federal judges lifetime appointments. These lifetime appointments are thought to insure that federal judges remain objective and neutral in their interpretation of the law.

> By freeing federal judges from continuing review by appointing authorities, conflicts of interest are minimized. An independent judiciary is the hallmark of the constitutional state. . . . From an interbranch conflict of interest perspective, this requirement ensures that judges confine themselves to concrete cases *and do not needlessly decide matters that are the business of political branches.*

Paul R. Verkuil, *The American Constitutional Tradition of Shared and Separated Powers: Separation of Powers, The Rule of Law and the Idea of Independence*, 30 Wm. & Mary L.Rev. 301, 308 (1989) (emphasis added).

It is undisputed that Congress has taken the initiative to deal with issues arising from the slave trade in the decades after the Civil War. *See e.g.*, Cong. Globe, 40th Cong., 1st Sess. 15, 49-56, 79, 114, 147, 203-08, 304-08, 463 (1867) (statements of Senator Sumner advocating land distribution to freed slaves). Moreover, in recent years, Congress has considered and rejected Representative Conyers' calls for the establishment of a commission to study the effects of slavery on the modern day African-American community. *See, e.g.*,

H.R. 40, 108th Cong. (2003), H.R. 40, 107th Cong. (2001). This district court will therefore not substitute its judgment for that of Congress on the matter of slave reparations. *See Baker*, 369 U.S. at 210, 82 S.Ct. 691; *see also Kashani v. Nelson*, 793 F.2d 818, 827 (7th Cir.1986); *Flynn v. Shultz*, 748 F.2d 1186, 1189 (7th Cir.1984); *Calvin v. Conlisk*, 520 F.2d 1, 5 (7th Cir.1975) (all emphasizing the constitutional principle of separation of powers, and the policy of judicial self-restraint).

It is also worthwhile in this context to again mention that, for the past 60 years, when the issue of reparations has arisen in regard to other minority groups, Congress has dealt with the issue. In 1946, Congress created the first reparations program "in order to redress a wide range of claims pressed by Indian tribes, including violations of treaties for which a judicial remedy was denied, and the loss of lands under treaties signed under duress." Posner and Vermeule, *supra*, at 695 (quoting Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 Ga. L.Rev. 453, 468 (1993)). In addition, in 1988, Congress authorized payment to Japanese-Americans interred during World War II. *See* Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L.Rev. 477, 477-78 (1998).

In sum, the issues raised in Plaintiffs' Complaint are more properly addressed by Congress and state legislatures. The question of slave reparations, and reparations for other historic injustices perpetrated on minority groups, has been addressed numerous times by various legislative branches

of our government. *See* H.R. 40, 108th Cong. (2003), H.R. 40, 107th Cong. (2001); C. Jeanne Bassett, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 Fla. St. U.L. Rev. 503 (1994) (explaining how the Florida legislature passed a bill granting reparations to African-American victims, and their descendants, of the 1923 Rosewood, Florida massacre). Most importantly, however, Plaintiffs' Complaint implicates all of the factors established by the Supreme Court identifying a non-justiciable political question. *See Baker*, 369 U.S. at 217, 82 S.Ct. 691. As such, each *Baker* factor provides a separate and independent basis for the court to dismiss Plaintiffs' Complaint under the well-settled political question doctrine. *See id.*

B. Failure to State a Claim Upon Which Relief Can be Granted

As discussed *infra*, Part IV, A.1., one of the fundamental defects of Plaintiffs' Complaint is lack of standing, as the Complaint fails to allege any constitutionally cognizable injury that is fairly traceable to Defendants. As an additional argument in support of dismissal, Defendants argue that Plaintiffs' Complaint fails to state a claim upon which relief can be granted. Although the court has dispositively determined that Plaintiffs lack standing to bring the claims raised in their Complaint, and that these claims present a non-justiciable political question, with an abundance of caution, the court will next determine whether the Complaint fails to state a claim upon which relief can be granted as an independent basis for dismissal.

Appendix B

The sufficiency of a complaint may be tested in a number of ways pursuant to Federal Rule of Civil Procedure 12: a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6); a motion for a more definite statement of a vague or ambiguous complaint pursuant to Rule 12(e); or a motion to strike redundant, immaterial, impertinent, or scandalous matter in a complaint pursuant to Rule 12(f). In this matter, Defendants have elected to proceed pursuant to Rule 12(b)(6), challenging whether Plaintiffs' Complaint states a claim upon which relief can be granted.

Pursuant to Federal Rule of Civil Procedure 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2); *see also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517(1993) (discussing "notice pleading" standards under the Federal Rules of Civil Procedure). Under this liberal notice pleading standard, " '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' " *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)).

The main function to be performed by the complaint is to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). "While federal notice-pleading allows for a generous reading of a complaint, in order to resist a motion to dismiss, the

complaint must at least set out facts sufficient to 'outline or adumbrate' the basis of the claim." *Panaras v. Liquid Carbonic Industries Corp.*, 74 F.3d 786, 792 (7th Cir.1996). The Federal Rules of Civil Procedure require the plaintiff to disclose adequate information regarding the basis of the claim for relief as distinguished from a bare averment that the plaintiff wants relief and is simply entitled to it. *See* 5 Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure:* Civil 2d § 1202 (2d ed.1990). A complaint contains adequate information regarding the basis of the claim for relief if it contains even "the bare minimum facts necessary to put the defendant on notice of the claim so that he can file an answer." *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir.2002). To provide a defendant with fair notice, "a complaint must allege facts bearing on all material elements necessary to sustain a recovery under some viable legal theory." *Looper Maintenance Service, Inc. v. City of Indianapolis*, 197 F.3d 908, 911 (7th Cir.1999) (citation omitted).

Plaintiffs claim that Defendants illegally profited from slavery without identifying the act or acts claimed to support this broad charge. This is insufficient to state a claim even under liberal notice-pleading standards. *See Higgs*, 286 F.3d at 439. As already indicated, Plaintiffs' Complaint fails to connect any alleged injury of any one of the Plaintiffs or their ancestors to alleged conduct by any one of the Defendants or their predecessors. Rather, Plaintiffs seek to hold Defendants liable for an entire era of history simply because their alleged predecessors were purportedly doing business in nineteenth century America. Plaintiffs' Complaint can be reduced to the following syllogism: Defendants or

their predecessors allegedly profited from the unpaid labor of former slaves, and Plaintiffs are descendants of former slaves, therefore, Plaintiffs are entitled to some of Defendants' profits. However, the allegations in a complaint must be those relating to the plaintiff, not those of someone else. *See Kyle v. Morton High School*, 144 F.3d 448, 455 (7th Cir.1998). The broad allegations of Plaintiffs' Complaint fail to give Defendants fair notice of what conduct is alleged to have injured which persons, in what manner, and when over the past four centuries covered in the Complaint.

In light of this omission failing to link any alleged conduct of Defendants or their alleged predecessors to Plaintiffs or their ancestors, Plaintiffs' Complaint relies in part on a conspiracy theory. Plaintiffs' Complaint alleges that Defendants or their alleged predecessors conspired with certain unnamed malefactors to violate the legal rights of certain unnamed victims—presumably all persons held in slavery—and thus are somehow liable based on a theory of third-party liability. However, Plaintiffs' Complaint fails to allege even the faintest outline of this conspiracy, let alone its members and Defendants', or their predecessors', alleged roles in that conspiracy. Even under liberal notice pleading standards, the pleading of a conspiracy requires a plaintiff to "indicate the parties, general purposes, and approximate date, so that the defendant has notice of what he is charged with." *Walker v. Thompson*, 288 F.3d 1005, 1007 (7th Cir.2002). Plaintiffs' conspiracy theory is similar to that in *Albiero v. City of Kankakee*, 122 F.3d 417, 420-21 (7th Cir.1997), where the plaintiffs alleged a conspiracy, but did not elaborate or provide any other allegations to support the conspiracy.

Appendix B

Plaintiffs' SCAC also brings two new common law claims—replevin and negligent infliction of emotional distress. Replevin is a cause of action "which lies to gain possession of *personal chattels* which have been taken from the plaintiff unlawfully." *In re Braun*, 3 F.2d 247, 249 (7th Cir.1924) (emphasis added). In other words, replevin actions seek the return of tangible items to their rightful owner. *See* 66 Am.Jur. 2d *Replevin* § 1 (2004) ("Replevin is a remedy stemming from the common law and it is a proceeding by which the owner or one who has an interest in a chattel taken or detained seeks to recover possession of the chattel"); *see also Smith v. United States*, 293 F.3d 984, 987 (7th Cir.2002); *Ruslan Shipping Corp. v. Coscol Petroleum Corp.*, 635 F.2d 648, 650 n. 5 (7th Cir.1980); *Phillips v. Money*, 503 F.2d 990, 993 (7th Cir.1974). In this case, Plaintiffs identify no specific, tangible items that have been taken or detained by Defendants. *See* SCAC, ¶ 290. To the extent that Plaintiffs seek the return of money from Defendants, such recovery is generally not allowed under replevin. *See* 66 Am.Jur. 2d *Replevin* § 9 (2004) ("Money is not subject to replevin unless it is marked or designated in some manner so as to become specific, as it regards the power of identification, such as being in a bag or package"); *see also Daenzer v. Wayland Ford, Inc.*, 193 F.Supp.2d 1030, 1041 (W.D.Mich.2002) ("replevin is an action used to effect the return of the subject property taken, not for the return of money"). Plaintiffs' new count of Replevin therefore fails to state a claim upon which relief could be granted. *See Looper*, 197 F.3d at 911.

Claims of negligent infliction of emotional distress can only succeed if the plaintiff can establish that the defendant owed plaintiff a particular, identifiable, duty of care.

See Schrott v. Bristol-Myers Squibb Co., 403 F.3d 940, 944 (7th Cir.2005); *Corgan v. Muehling*, 143 Ill.2d 296, 158 Ill.Dec. 489, 574 N.E.2d 602, 606 (1991) (finding that a psychologist owed his client such a duty of care). In this case, Plaintiffs fail to allege any facts from which the court could find that Defendants' pre-civil war actions breached any duty of care to the present day Plaintiffs. Plaintiffs' new count of negligent infliction of emotional distress therefore fails to state a claim upon which relief could be granted. *See Looper*, 197 F.3d at 911.

Plaintiffs also, in their SCAC, include new allegations that certain Defendants made "intentional misrepresentations" in connection with alleged violations of various state consumer protection laws. SCAC, ¶¶ 227-256. Plaintiffs, however, still fail to allege a specific, concrete harm or an ascertainable loss as a result of Defendants' alleged violations of these statutes. *See* SCAC, ¶ 104 ("Some or all of the Plaintiffs are presently consumers of defendants. Due to the unconscionable, fraudulent and deceptive public communications made by defendants, plaintiffs suffered the harm of being misled, confused, and deceived about the roles the defendants played in the enslavement of African people"); SCAC, ¶ 106 ("Some or all of the Plaintiffs have suffered the harm of being unconscionably denied the benefits of a competitive market for the goods and services they purchase from defendants"); SCAC, ¶¶ 321, 331, 339, 348, 357, 365 (alleging that these misrepresentations caused "monetary and other economic damages to Plaintiffs"). Plaintiffs thus fail to state a claim upon which relief can be granted under the state consumer protection statutes of New York, Texas, Illinois, and Louisiana. *See, e.g., Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 731 N.E.2d 608 (N.Y.2000); *Chandler v. Gene Messer Ford, Inc.*, 81 S.W.3d 493, 501

(Tx.App.2002); *Jenkins v. Mercantile Mortg. Co.*, 231 F.Supp.2d 737, 747 (N.D.Ill.2002); *Inka's S'Coolwear, Inc. v. School Time, L.L.C.* 725 So.2d 496, 501 (La.Ct.App.1998) (all indicating that plaintiffs must have suffered actual, ascertainable damages in order to sue under state consumer protection statutes).

In addition, Plaintiffs fail to allege that any Defendant made any allegedly false representation to a Plaintiff regarding a specific product or service; Plaintiffs thus fail to state a claim under Illinois' deceptive advertising and misleading trade identification statute. *See Lynch Ford, Inc. v. Ford Motor Co.*, 957 F.Supp. 142, 147 (N.D.Ill.1997). Plaintiffs also fail to allege any commercial practice with the capacity to mislead any Plaintiff regarding identifiable products or services; Plaintiffs thus fail to state a claim under New Jersey's state consumer protection statutes. *See Island Mortgs. v. 3M*, 373 N.J.Super. 172, 177, 860 A.2d 1013 (N.J.Super. Ct. Law Div.2004). Finally, Plaintiffs' allegations as outlined in paragraphs 227-256 of the SCAC indicate only that Defendants have responded publicly to Plaintiffs' claims. The making of these public statements in response to a lawsuit is simply not "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers;" Plaintiffs thus fail to state a claim under California's consumer protection statutes. *See Wolfe v. State Farm*, 46 Cal.App.4th 554, 561, 53 Cal.Rptr.2d 878 (Cal.Ct.App. 1996). The court therefore dismisses all of these state law claims. *See Goetzke v. Ferro Corp.*, 280 F.3d 766, 779 (7th Cir.2002) ("If a state substantive law has denied a plaintiff a remedy for his cause of action, the district court must dismiss the complaint for failure to state a claim upon which relief may be granted").

Plaintiffs' Complaint in its entirety thus fails to meet the notice pleading requirements set forth in the Federal Rules of Civil Procedure. "This is not a case where the plaintiff has been tripped up by 'mere technicalities,' but rather, the plaintiff has omitted the gravamen of his complaint." *Kyle*, 144 F.3d at 457. Plaintiffs' Complaint is a pastiche of the generally acknowledged horrors of slavery, totally devoid of allegations of concrete, specific, ascertainable injury to the Plaintiffs or corresponding conduct committed by Defendants. "This glaring gap in the complaint leaves total speculation as the only alternative for the court to come up with any set of facts justifying relief." *Id.* at 454. Defendants cannot be deemed to have fair notice of Plaintiffs' claims when they are based solely on speculation. Further, the court cannot indulge this speculation and attempt to determine whether Plaintiffs' Complaint could set forth any set of facts justifying relief, as "[t]hat is not the court's job." *Id.* In short, Plaintiffs fail to present a well-pleaded complaint that can withstand scrutiny under Rule 12(b)(6), even under liberal notice pleading standards.

C. Statutes of Limitations

As an additional argument in support of dismissal, Defendants argue that Plaintiffs' claims are time-barred by operation of various statutes of limitations. Once again, although the court has dispositively determined that Plaintiffs lack standing to bring the claims raised in their Complaint, that these claims present a non-justiciable political question, and fail to state a claim upon which relief can be granted, with an abundance of caution, the court will also determine whether statutes of limitations defenses would also constitute an independent basis for dismissal.

Appendix B

1. Overview of Statutes of Limitations

The concept of limitations periods to the bringing of legal actions has been well-established in the law for centuries. Limitations on actions can be traced back to early Roman law. *See Developments in the Law: Statutes of Limitations* 63 Harv. L. Rev.. 1177 (1950) (citing Sohm, *The Institutes of Roman Law* 318-22 (Ledlie's trans., 3d ed.1907)). As part of our Anglo-American common law system of law, statutes of limitations can be traced as far back as 1189 for actions concerning property right disputes. *See* Thomas E. Atkinson, *Some Procedural Aspects of the Statute of Limitations*, 27 Colum. L.Rev.. 157, 162 (1927) (chronicling the history of statutes of limitations). While the concept of statutes of limitations has evolved over the centuries well beyond the realm of property law, the general principles behind this concept remain the same.

One principle behind statutes of limitations is the promotion of justice. In his work *The Path of the Law*, Oliver Wendell Holmes reflected on statutes of limitations, asking: "What is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?" Oliver W. Holmes, Jr., *The Path of the Law*, 10 Harv. L.Rev.. 457, 476 (1897).[33] To answer Holmes' question, the justification is fairness to litigants. This fairness is achieved through two goals of statutes of limitations: first, to provide

33. Also reflecting on the purposes served by statutes of limitations, the Supreme Court once stated: "Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 313, 65 S.Ct. 1137.

the defendant notice of the plaintiff's claims; and second, to provide repose to the defendant. "Statutes of limitations . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49, 64 S.Ct. 582, 88 L.Ed. 788 (1944). Statutes of limitations are based on "[t]he theory that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Id.* at 349, 64 S.Ct. 582. In addition, the Supreme Court has explained that:

> Statutes of limitations find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. [citation omitted] They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what is now called a "fundamental" right or what used to be called a

> "natural" right of the individual. [Plaintiffs] may, of course, have the protection of the policy while it exists, but the history of pleas of limitations shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945).

The procedural requirements established by various legislatures for gaining access to the courts are not to be disregarded out of a vague sympathy for particular litigants. *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 2071, 153 L.Ed.2d 106 (2002) (citing *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984)). "Statutes of limitations are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir.1990). Statutes of limitations are regulations set by the legislature, designed to set a time period in which to file an action. "They protect important social interests in certainty, accuracy, and repose." *Id.* "Though rarely the subject of sustained scholarly attention, the law concerning statute of limitations fairly bristles with subtle, intricate, and often misunderstood issues. . . ." *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 849 (7th Cir.1996).

> A plaintiff may not base [the] suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the

> plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations.

National R.R. Passenger Corp., 536 U.S. at 117, 122 S.Ct. 2061 (quoting *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164 (7th Cir.1996)).

Two important concepts frequently addressed by litigants when dealing with statutes of limitations are accrual and tolling. Accrual denotes the point in time when an action can be maintained. "A cause of action 'accrues' when a suit may be maintained thereon, and the law in this regard differs from state-to-state and by nature of action." *Deluxe Black's Law Dictionary*, 6th edition at 21 (1990). The proverbial clock starts to run when the action accrues. It is not the date on which the wrong that injures the plaintiff occurs, but the date—often the same, but sometimes later—on which the plaintiff discovers that he has been injured. While discovery of the injury in some cases may be complex, in others it would be immediately obvious, as in the case of the brutal application of the lash, the turning of the screw, or the tightening of the leg chains nightly to a post. As a complement to accrual, tolling is a concept which suspends the running of a limitations period to an accrued action. The proverbial clock is stopped when the action is tolled.

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2. Statutes of Limitations as Applied to Plaintiffs' Claims

Since statutes of limitations are defenses to claims, a plaintiff ordinarily need not anticipate or attempt to defuse these defenses in a complaint. *See Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). However, "[a] litigant may plead itself out of court by alleging (and thus admitting) the ingredients of a defense. . . ." *United States Gypsum Co. v. Indiana Gas Co., Inc.*, 350 F.3d 623, 626 (7th Cir.2003) (citation omitted); *see also Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir.1998) ("Litigants may plead themselves out of court by alleging facts that establish defendants' entitlement to prevail."); *Soo Line R.R. Co. v. St. Louis S.W. Ry. Co.*, 125 F.3d 481, 483 (7th Cir.1997) (indicating that a "plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts").

The allegations of Plaintiffs' Complaint do admit the ingredients of a statute of limitations defense. Plaintiffs allege that their claims arise out of the institution of human chattel slavery as it existed in America, and acknowledge that this institution ended in 1865. SCAC, ¶ 5. Plaintiffs, however, claim that these injuries are recurring as long as Defendants do not provide a proper accounting of the profits allegedly gained by them or their predecessors throughout the years from commercial activities relating to the institution of slavery. *See, e.g., id.* ¶ 58, 3(a) (demanding that Defendants "provide a full accounting of their actions, including, but not limited to, turning over all documents in their possession related in any way to the slave trade and slavery").

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Plaintiffs' claims fall into three groups: common law claims, state statutory claims, and federal statutory claims.[34] Plaintiffs' common law claims include: Count I: Conspiracy, Count II: Conversion, Count III: Unjust Enrichment, Count IV: Replevin, Count V: Intentional Infliction of Emotional Distress, and Count VI: Negligent Infliction of Emotional Distress. Plaintiffs sole federal statutory claim is Count IV: 42 U.S.C. § 1982.[35] Plaintiffs' state statutory claims, included in Counts VII through XIII, allege violations of consumer protection laws in New York, Texas, California, Illinois, Louisiana, and New Jersey.

Defendants point to the law of Illinois as an example to show that Plaintiffs' state common law claims are time-barred by many years, and extrapolate that all of Plaintiffs' claims would also be time-barred under any conceivable choice of law analysis using the law of any given state, or federal law. Mem. in Supp. of Defs.' Mot. to Dismiss II, at 1, 4. Plaintiffs fail to object to Defendants' argument, and do not argue that there is any material conflict among the various state choice

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34. The court notes that neither Plaintiffs nor Defendants engage in a choice of law analysis. As to Plaintiffs' state law claims, the court normally would apply the choice of law principles of the state in which each transferor court sits. *See Ferens v. John Deere Co.*, 494 U.S. 516, 518-19, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990) (indicating that in actions transferred pursuant to 28 U.S.C. § 1407(a), the transferee court applies the choice of law principles of the state where the transferor court sits for an analysis of state law claims). The court notes that the vagueness of Plaintiffs' Complaint prevents a thorough choice of law analysis.

35. Plaintiffs allege two separate versions of "Count IV."

of law principles that could be applied in this case. Therefore the statutes of limitations for Plaintiffs' claims are as follows:

- **Civil Conspiracy-five years.** *See e.g.*, *Wilson v. Giesen*, 956 F.2d 738, 740-41 (7th Cir.1992).

- **Conversion-five years.** *See*, *e.g.*, *Bontkowski v. Smith*, 305 F.3d 757, 763 (7th Cir.2002); 735 Ill. Comp. Stat.. 5/13-205.

- **Unjust Enrichment-five years.** *See*, *e.g.*, *Burns Philp Food, Inc. v. Cavalea Cont'l Freight, Inc.*, 135 F.3d 526, 527 (7th Cir.1998); 735 Ill. Comp. Stat.. 5/13-205.

- **Replevin-five years.** *See*, *e.g.*, *Hitt v. Stephens*, 285 Ill.App.3d 713, 221 Ill.Dec. 368, 675 N.E.2d 275, 277 (Ill.App.Ct.1996); 735 Ill. Comp. Stat.. 5/13-205.

- **Intentional Infliction of Emotional Distress-two years.** *See*, *e.g.*, *Dahl v. Fed. Land Bank Ass'n of W. Ill.*, 213 Ill.App.3d 867, 157 Ill.Dec. 242, 572 N.E.2d 311, 314 (Ill.App.Ct.1991); 735 Ill. Comp. Stat.. 5/13-202.

- **Negligent Infliction of Emotional Distress-two years.** *See* 735 Ill. Comp. Stat.. 5/13-202.

- **42 U.S.C. § 1982-two years.** *See*, *e.g.*, *Honorable v. The Easy Life Real Estate Sys., Inc.*, 182 F.R.D. 553, 563 (N.D.Ill.1998).

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- **New York Consumer Protection from Deceptive Acts and Practices Laws, N.Y. Gen. Bus. Law §§ 348, 350-three years.** *See, e.g., Soskel v. Handler*, 189 Misc.2d 795, 736 N.Y.S.2d 853, 855 (N.Y.Sup.Ct.2001); N.Y. C.P.L.R. § 214.

- **Texas Deceptive Trade Practices and Consumer Protection Act, Tex. Bus. & Com.Code Ann. § 17.41-two years.** *See* Tex. Bus. & Com.Code § 17.565.

- **California Business and Professions Code § 17200 et seq.-four years.** Cal. Bus. & Prof Code § 17208.

- **Illinois Consumer Fraud and Deceptive Business Act, 815 Ill. Comp. Stat. 505/1-three years.** *See, e.g., Dreisilker Elec. Motors, Inc. v. Rainbow Elec. Co.*, 203 Ill.App.3d 304, 150 Ill.Dec. 167, 562 N.E.2d 970, 972-73 (Ill.App.Ct.1990); 815 Ill. Comp. Stat.. 505/10a(e).

- **Louisiana Unfair Trade Practices and Consumer Protection Law, La Rev. Stat. Ann. § 51:1401-one year.** *See* La.Rev.Stat. § 51:1409(e).

- **New Jersey Unfair Trade Practice Law, N.J. Stat. Ann. § 56:8-1-six years.** *See, e.g., Mirra v. Holland Am. Line*, 331 N.J.Super. 86, 751 A.2d 138, 140 (N.J.Super.Ct.App.Div.2000).

Given that the institution of chattel slavery in the United States ended in 1865, Plaintiffs' century-old claims would

have accrued by 1865 at the latest. The longest limitations period for any of Plaintiffs' century-old claims is five years, which would have run well over a century prior to the filing of the instant Complaint. If cognizable claims ever existed, those claims were owned by former slaves themselves, and became time-barred when the statutes of limitations expired in the nineteenth century. As such, Plaintiffs' century-old claims are barred by the statutes of limitations in every jurisdiction.

Plaintiffs, however, also allege that Defendants are currently making intentional misrepresentations regarding Defendants' past involvement in the institution of slavery, and that these misrepresentations presently violate various state consumer laws. The court finds, however, that Plaintiffs have not alleged that any concrete, material misrepresentations were made to any specific Plaintiffs within the various statutory periods. Plaintiffs' allegations of continuing misrepresentations by Defendants include the following. "Two years ago, Aetna expressed regret for 'any involvement' it 'may have' had in insuring slaves. Today it stands by that statement and says it has been able to find only seven policies insuring 18 slaves." SCAC, ¶ 230. "While abhorring slavery, Richmond, Virginia-based CSX offered an online statement that noted the lawsuit filed against it and 'other corporations demanding financial reparations is wholly without merit and should be dismissed.' " *Id.* ¶ 233. "J.P. Morgan spokesman Thomas Johnson said that the 'allegations are without merit' and that the company's archives don't support the claims in the litigation." *Id.* ¶ 236. "CN's Chicago-based spokesperson, Jack Burke, denies up and down that the company, or any of its predecessors, profited from slave labor." *Id.* ¶ 239. "A FleetBoston spokesman said it appears there is no connection to Brown's bank, though FleetBoston doesn't have records that

date back 200 years." *Id.* ¶ 243. "R.J. Reynolds spokeswoman Maura Payne said the allegations are 'completely without merit' because the company was founded in 1876, a decade after slavery was abolished." *Id.* ¶ 245.

In essence, Plaintiffs allege that Defendants have made intentional misrepresentations about their involvement with slavery for many years, and that Defendants continue to do so today. However, the specific statements alleged in Plaintiffs' Complaint, as listed in paragraphs 227-256, reveal no more than that Defendants have made generalized denials of the merits of Plaintiffs' lawsuit. Plaintiffs point to no concrete instances of material misrepresentations that have been made by Defendants within any of the statutory periods prescribed under the state consumer law counts. *See Harley-Davidson Motor Co. v. Powersports, Inc.*, 319 F.3d 973, 989 (7th Cir.2003) (a misrepresentation occurs where a party makes an assertion "that does not accord with facts as they exist"); *Neder v. United States*, 527 U.S. 1, 22, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (a statement is material if a reasonable individual would believe it to be important in "determining [a] choice of action. . . ."). Plaintiffs, in fact, fail to allege that Defendants have engaged in any actionable fraudulent or deceptive business practice under the respective state statutes within the respective statutory time frames. *See infra* IV.B. Plaintiffs' state law consumer claims are therefore barred by the above cited statutes of limitation.[36]

36. Nothing in Plaintiffs' Complaint suggests that these State consumer law claims were even remotely contemplated by any Defendant or predecessor during the time slavery existed as an institution in the United States. The court also notes that Plaintiffs' first Complaint alleged Counts of Accounting and the Alien Torts Claims Act. The court found that these Claims were also barred by the applicable statutes of limitations. *See In re Slave Descendants Litigation*, 304 F.Supp.2d 1027, 1068-1070 (N.D.Ill.2004).

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3. Doctrines to Extend Statutes of Limitations Periods

Plaintiffs attempt to avoid having their claims deemed time-barred by arguing a number of doctrines. Specifically, Plaintiffs contend that all of the respective statutes of limitations should be categorically tolled based on several undeveloped theories, including either the discovery rule, the continuing violation doctrine, equitable estoppel, or equitable tolling. Mem. in Opp. to Defs.' Mot to Dismiss I, 16-24; Mem. in Opp. to Defs.' Mot. to Dismiss II., 1, 5-8. These four principles, in one way or another, allow a plaintiff to bring a claim that on its face falls outside a statute of limitations. Both the discovery rule and the continuing violations doctrine deal with when the accrual of a claim is established. In contrast, the doctrines of equitable estoppel and equitable tolling allow a plaintiff to assert a claim after it has accrued by tolling the respective statutes of limitations. However, as the court will discuss below, these doctrines cannot revive claims already barred by a statute of limitations.

a. Discovery Rule

The discovery rule postpones the beginning of a limitations period until such time as the plaintiff discovers the injury, or through reasonable diligence should have discovered the injury. *See Cada*, 920 F.2d at 450. The discovery rule thus keeps a claim from accruing until the plaintiff knows or through reasonable diligence should have known of the injury. *See TRW Inc. v. Andrews*, 534 U.S. 19, 27, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001).

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In support of their argument that the discovery rule should delay accrual of their claims, Plaintiffs argue that "[slaves] were not privy to every legal harm they suffered, nor the causes and extent of those harms." SCAC, ¶ 44. Specifically, Plaintiffs argue that "in their miserable condition which was a direct result of slavery . . . although intimately familiar with their pitifully horrific condition, [they] were not aware of the nature of the investments, insurance policies, joint ventures and other schemes and conspiracies developed and utilized by these defendants . . . to profit from slavery." Mem. in Opp. to Defs.' Mot. to Dismiss I, at 17; Mem. in Opp. to Defs.' Mot. to Dismiss II, at 1.

In response, Defendants assert that Plaintiffs' Complaint fails to allege any act committed by any specifically named Defendant or their predecessors which was intended to conceal any cause of action from any Plaintiffs or their ancestors. Mem. in Supp. of Defs.' Mot. to Dismiss II, at 5. Further, Defendants argue that since the alleged injuries were known, or knowable, to Plaintiffs' ancestors over a century ago, the discovery rule is simply inapplicable in this case. Mem. in Supp. of Defs.' Mot. to Dismiss I, at 23-24.

Plaintiffs are attempting to recover for injuries incurred by their ancestors over a century ago. Plaintiffs' ancestors knew or should have known that they were being brutalized and wrongfully forced to work for people, plantations, companies, and industries without being compensated. If they did not know of their exact injury at the time it occurred, they certainly should have known of it after the Civil War, the passing of the Civil War Amendments, or even the Civil Rights Movement of the 1960s. Furthermore, there is

evidence that other former slaves were aware of their injuries and previously have attempted to recover for them well before this action was filed. *See, e.g., Johnson v. McAdoo*, 45 App. D.C. 440 (1916) (evidencing a claim for slavery reparations nearly a century ago).

Plaintiffs would have the Court extend the applicable statutes of limitations indefinitely, or at least until all of the discovery Plaintiffs desire is completed. "By tying the start of the limitations period to a plaintiff's reasonable discovery of a pattern rather than to the point of injury or its reasonable discovery the [discovery] rule would extend the potential for most . . . cases well beyond the time when a plaintiff's cause of action is complete." *Rotella v. Wood*, 528 U.S. 549, 558, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000). The mere fact that Plaintiffs' ancestors did not know exactly how much profit was made from their slave labor is not enough to establish that the discovery rule should apply in this case. "The federal common law discovery rule does not permit the plaintiff to delay filing its lawsuit until all foreseeable harms arising from the injury are actually experienced, but only until the plaintiff discovers the predicate injury." *Brademas v. Indiana Housing Finance Authority*, 354 F.3d 681, 687 (7th Cir.2004). The predicate injury in this instance was the institution of slavery itself. Plaintiffs make a veiled attempt to tie the beginning of the statutes of limitations periods to the discovery of the damages that flowed from slavery, rather than the predicate injury itself. Again, the discovery doctrine only extends the statutes of limitations until the predicate act is discovered, not until all discovery of its consequences is completed. *See Rotella*, 528 U.S. at 558, 120 S.Ct. 1075. Therefore, the discovery rule, when applied in this instance, does not delay accrual of the claims alleged.

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b. Continuing Violation Doctrine

The continuing violations doctrine, although slightly different from the discovery rule, allows the plaintiff to file an action when there is a continuous series of injuries stemming from the same injury. Under this doctrine, the statutes of limitations are not tolled *per se*, but rather left open until a final injury has accrued. *See Heard v. Sheahan*, 253 F.3d 316, 319 (7th Cir.2001). "The plaintiff must show a 'continuing violation,' which the Seventh Circuit has described as a 'continuous series of events giving rise to a cumulative injury.' " *Hoagland v. Town of Clear Lake, Ind.*, 344 F.Supp.2d 1150, 1162 (N.D.Ind.2004) (quoting *Heard*, 253 F.3d at 320). "The continuing violation doctrine allows a complainant to obtain relief for a time-barred act of discrimination by linking it with acts that fall within the statutory limitations period." *Filipovic v. K & R Exp. Systems, Inc.*, 176 F.3d 390, 396 (7th Cir.1999) (citing *Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir.1992)). Courts will then treat the series of acts as one continuous act ending within the limitations period. *See id.* "Unlike tolling principles, this doctrine is not equitable in nature; rather, it is 'best described as a doctrine governing the accrual of a claim.' " *Macklin v. United States*, 300 F.3d 814, 824 (7th Cir.2002) (quoting *Pitts v. City of Kankakee*, 267 F.3d 592, 595 (7th Cir.2001)). The continuing violation doctrine is applicable only if it would have been unreasonable to expect the plaintiff to sue before the statute ran on the conduct. *See id.; see also Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1167 (7th Cir.1996). "In other words, a plaintiff who feels discriminated against by a discrete act, but fails to timely file charges on that act, cannot later reach back to those events

when the statute of limitations expires in order to form a continuing violation claim." *Tinner v. United Ins. Co. of Amer.*, 308 F.3d 697, 708 (7th Cir.2002).

As a preliminary matter, Plaintiffs assert that the continuing violation doctrine should be applied to their demand for an accounting. *See* Mem. in Opp. to Defs.' Mot. to Dismiss II., at 7-8. Plaintiffs assert that they are continually hurt because they have not received an accounting of the monies owed to them and their ancestors for work they did while enslaved, and that Defendants continue to profit from the revenue they earned from the labor of Plaintiffs' ancestors. In support of their argument that the continuing violations doctrine should delay accrual of their claims, Plaintiffs argue that Defendants' failure to provide a proper accounting of the profits allegedly gained by them or their predecessors throughout the years from commercial activities relating to the institution of slavery constitutes a continuing violation. In response, Defendants argue that Plaintiffs do not allege a continuing violation; rather, they are alleging a single event with purported continuing injuries. Mem. in Supp. of Defs.' Mot. to Dismiss I, at 25; Mem. in Supp. of Defs.' Mot. to Dismiss II, at 1.

With respect to this assertion, the underlying injury concerns the denial of payments for the forced labor of Plaintiffs' ancestors. All of the other ills and consequences that flowed from this injury, no matter how dreadful, do not constitute new or continuing claims. They are merely the alleged effects of an injury that occurred over a century ago, and not a continuing series of acts. *See Diliberti v. United States*, 817 F.2d 1259, 1264 (7th Cir.1987) (citing *Ward v.*

Caulk, 650 F.2d 1144, 1147 (9th Cir.1981) ("A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation."); *Oppenheim v. Campbell*, 571 F.2d 660, 662 (D.C.Cir.1978) (without any continuing unlawful actions by defendant, plaintiff's claim accrued when he was "first harmed")).

Plaintiffs also assert that Defendants' present day failure to produce an accounting of whether they profited from the slave trade constitutes a new and continuing violation. Mem. in Opp. to Def.'s Mot. to Dismiss II, at 7-8. Again, Plaintiffs' assertions are incorrect. Plaintiffs' assertions are merely a veiled attempt to circumvent the statutes of limitations for their underlying claims. Plaintiffs have not alleged any new unlawful conduct by Defendants; but have merely alleged a continuing adverse consequence of prior unlawful conduct. *See Diliberti*, 817 F.2d at 1264. Therefore, the continuing violation doctrine, when applied in this instance, does not delay the accrual of the claims alleged.

c. Equitable Estoppel

Equitable estoppel allows a plaintiff to bring a cause of action after a statute of limitations has expired when the " 'defendant takes active steps to prevent the plaintiff from suing on time.' " *Brademas*, 354 F.3d at 686-87 (quoting *Sharp v. United Airlines, Inc.*, 236 F.3d 368, 372 (7th Cir.2001)); *see Lucas v. Chicago Transit Auth.*, 367 F.3d 714, 722 (7th Cir.2004). For example, a defendant can prevent a plaintiff from filing his or her claim on time either by informing the plaintiff that the defendant will not assert the statute of limitations as a defense, or by fraudulently

concealing the injury after the fact. *See Holmberg v. Armbrecht*, 327 U.S. 392, 396-97, 66 S.Ct. 582, 90 L.Ed. 743 (1946); *Brademas*, 354 F.3d at 686-87 (citing *Sharp*, 236 F.3d at 372). "The 'granting of equitable estoppel should be premised on a defendant's improper conduct as well as a plaintiff's actual and reasonable reliance thereon.' " *Hentosh v. Herman M. Finch Univ. of Health Sci./The Chicago Medical School*, 167 F.3d 1170, 1174 (7th Cir.1999) (quoting *Wheeldon v. Monon Corp.*, 946 F.2d 533, 537 (7th Cir.1991)).

Plaintiffs do not assert, nor is there any indication, that Plaintiffs failed to file their claims within the appropriate time limitations because Defendants promised not to plead the statutes of limitations as a defense. Rather, Plaintiffs assert that they did not properly file their claims within the appropriate time frame because of Defendants' unwillingness to divulge information about their ties to slavery, and that Defendants actively misled them; in other words, Plaintiffs allege that Defendants fraudulently concealed their involvement with slavery. *See* SCAC, ¶ 227; Mem. in Opp. to Defs.' Mot. to Dismiss I, at 22-23. Specifically, Plaintiffs assert that:

> (1) defendants withheld documents and information related to their illegal profits from slavery and/or lied about their participation in slavery; (2) the fact that the defendants benefitted from concealing the information and that the concealment was so complete, provides a sufficient basis to conclude that they were aware of the concealment; (3) plaintiffs did not know of the defendants conduct or illegal profits and

> therefore could not have known of the concealment and/or misrepresentations; (4) defendants in concealing the information knew that this concealment would protect them from accountability for their actions; (5) plaintiffs' lack of information was reasonable and in good faith given the nature of defendants' conduct and plaintiffs' conditions; and (6) clearly justice would not be served by allowing the defendants to benefit from their concealing behavior as measured against the extreme harm suffered by plaintiffs and their ancestors.

Mem. in Opp. to Defs.' Mot. to Dismiss I, at 23. In response, Defendants assert that Plaintiffs fail to plead, let alone particularize, the required elements of equitable estoppel.

Plaintiffs have not asserted any facts alleging that any Defendant concealed information in a way that would have prevented Plaintiffs' ancestors from asserting their claims within the proscribed statutes of limitations periods. Plaintiffs do not allege that Defendants concealed the injury. In fact, the injury was not concealed, but rather quite obvious when inflicted. Plaintiffs merely make vague generalizations about Defendants and their perceived practices. Plaintiffs' vague assertions are not enough to satisfy the requirements for equitable estoppel. *See Hentosh*, 167 F.3d at 1174; *see also Williamson v. Indiana Univ.*, 345 F.3d 459, 463 (7th Cir.2003) (denying equitable estoppel based on plaintiff's failure to present any evidence that defendant took active steps to prevent her from bringing her charge within the allotted time). Therefore, equitable estoppel, when applied in this instance,

does not toll the statutes of limitations. *See Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1095 (7th Cir.1992) (fraudulent concealment requires some sort of trick or contrivance by a defendant).

d. Equitable Tolling

"Equitable tolling applies when a plaintiff, despite due diligence, is unable to obtain enough information to conclude that there is a basis for a claim." *Brademas*, 354 F.3d at 686-87 (citing *Sharp*, 236 F.3d at 373). As distinguished from equitable estoppel, equitable tolling "permits a plaintiff to sue after the statute of limitations has expired if through no fault or lack of diligence on his part he was unable to sue before, even though the defendant took no active steps to prevent him from suing." *Singletary v. Continental Ill. Nat'l. Bank & Trust Co.*, 9 F.3d 1236, 1241 (7th Cir.1993) (citing *Heck v. Humphrey*, 997 F.2d 355, 357 (7th Cir.1993)); *see also Cada*, 920 F.2d at 451 (indicating that equitable tolling does not require a finding of any conduct on the part of the defendant). "Equitable tolling is frequently confused with both fraudulent concealment [equitable estoppel] on the one hand and with the discovery rule—governing, as we have seen, accrual—on the other hand." *Cada*, 920 F.2d at 451.

Equitable tolling "halts the running of the limitations period so long as the plaintiff uses reasonable care and diligence in attempting to learn the facts that would disclose the defendant's fraud or other misconduct." 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedures § 1056, at 239 (3d. ed.2002); *see also Cada*, 920 F.2d at 451. When dealing with equitable tolling between two

innocent parties, "the negligence of the party invoking the doctrine can tip the balance against its application. . . ." *Jackson v. Rockford Housing Auth.*, 213 F.3d 389, 397 (7th Cir.2000) (quoting *Cada*, 920 F.2d at 453). A plaintiff invoking equitable tolling to suspend the statute of limitations must bring suit within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information.

Plaintiffs assert that in this instance the only relevant question as to equitable tolling is "whether the circumstances preventing the plaintiffs from gaining equal access to the justice system over the past decades are sufficiently extraordinary to justify application of the equitable tolling doctrine." Mem. in Opp. to Defs.' Mot. to Dismiss I, at 19. Plaintiffs base this assertion on the fact that they were only recently able to obtain the necessary information to assert their claims, as a result of the "uniquely catastrophic historical context from which their class is still seeking to advance and from which the defendants are still profiting." *Id.* at 20.

It is true that because of the institution of slavery, the Jim Crow laws, and the lingering bigotries and separatist views following the Civil War, African-Americans were obstructed from obtaining necessary information on their claims and in some instances access to the legal system. Nevertheless, Plaintiffs' ancestors knew of their injury at the time that it occurred. They knew, or should have known, that they were wrongfully being forced to work without compensation, and that somebody was making a profit from their labor. Yet, neither Plaintiffs nor their ancestors ever

asserted these claims in a court of law until now. Plaintiffs have not shown that they acted with all due diligence in attempting to obtain vital information about their claims, and assert them timely. *See Marbury*, 5 U.S. at 163 ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury").

Plaintiffs' contentions fly in the face of numerous well-settled legal principles and history. African-Americans, as well as various other ethnic groups, have previously brought claims seeking reparations in one form or another, against both public and private entities. *See Johnson*, 45 App. D.C. at 440; *see also Deutsch*, 317 F.3d at 1028-29 (affirming dismissal of slave labor claims against private corporations as, *inter alia*, time-barred), amended by 324 F.3d 692; *Wolf*, 95 F.3d at 544 (dismissing claims against private defendant on standing grounds); *Kelberine*, 363 F.2d at 992 (dismissing on justiciability and statute of limitations grounds reparations claims for World War II era slave labor against a private company); *In re Nazi Era Cases Against German Defendants Litig.*, 129 F.Supp.2d at 389 (dismissing slave and forced labor claims as nonjusticiable); *Iwanowa*, 67 F.Supp.2d at 424; *Burger-Fischer*, 65 F.Supp.2d at 248. Plaintiffs merely make vague assertions and generalizations as to their claims and the state of the legal system. Plaintiffs' vague assertions and generalizations are not enough to toll the statutes of limitations on their claims. Plaintiffs' Complaint is nothing more than an attempt to by-pass the various statutes of limitations by chronicling the social inequities and injustices that have befallen African-Americans as a result of slavery. The statutes of limitations, however, "are not to be

disregarded by courts out of a vague sympathy for particular litigants." *Morgan*, 122 S.Ct. at 2071. The doctrine of equitable tolling therefore does not apply in this instance.

4. Conclusion

Plaintiffs' attempt to bring claims over a century old are barred by the applicable statutes of limitations. Plaintiffs have failed to assert any factual or legal basis for allowing them to proceed with their cause of action in light of when their claims accrued or when, with due diligence, Plaintiffs found that they would have accrued. Plaintiffs attempt to avoid this legal reality by pleading vague factual generalities and chronicling the social and economic injustices that have befallen African-Americans due to slavery. However, statutes of limitations serve to promote justice for litigants, *see Donaldson*, 325 U.S. at 314, 65 S.Ct. 1137, which cannot be disregarded out of vague sympathy for Plaintiffs and their claims. *See Morgan*, 122 S.Ct. at 2071. Therefore, the court finds that Plaintiffs' claims are barred by the applicable statutes of limitations.

V. CONCLUSION

It is beyond debate that slavery has caused tremendous suffering and ineliminable scars throughout our Nation's history. No reasonable person can fail to recognize the malignant impact, in body and spirit, on the millions of human beings held as slaves in the United States. Neither can any reasonable person, however, fail to appreciate the massive, comprehensive, and dedicated undertaking of the free to liberate the enslaved and preserve the Union. Millions

fought in our Civil War. Approximately six hundred and twenty thousand died. Three hundred and sixty thousand of these individuals were Union troops. Union soldiers, sailors, and marines gave their lives on bloody battlefields and the sea to maintain one sovereign nation in which slavery would be eradicated. The impact of this struggle on the families of the wounded and the dead was immeasurable and lasting. The victorious and the vanquished together shared the cup of suffering. Death deprived the youthful warriors of the opportunities that survivors of the War would enjoy. The impact of this struggle on the Union as a whole was also significant. The enslavers in the United States who resisted or failed to end human chattel slavery sustained great personal and economic loss during and following the four years of the War. Generations of Americans were burdened with paying the social, political, and financial costs of this horrific War.

Finally, in 1865, this great human and economic tragedy ended. The ultimate objectives, the preservation of the Union and the eradication of slavery, were accomplished. The "yoke of bondage" was removed from Garrison Frazier, to whom we earlier referred, and millions of other slaves. The freed slaves then began another journey, this time not from captivity to slavery, but from slavery to citizenship and equality under the law. All of the participants had endured great suffering in this momentous conflict. It takes little imagination to understand the tremendous disruption and destabilization the Civil War caused America's existing social and political institutions. And yet, the dark clouds following the War were giving way to a future brighter than the great majority could have imagined in 1865. The extremely difficult task of

amending the Constitution three times was accomplished in approximately five years, granting former slaves freedom, citizenship, and the right to vote. The citizens of the Union would move onward to meet the challenge made by President Lincoln on March 4, 1865, "to achieve and cherish a just and lasting peace, among ourselves and with all nations."

Plaintiffs' Complaint, which seeks reparations for Defendants' alleged roles in chattel slavery, the institution that precipitated this great conflict, fails based on numerous well-settled legal principles. First, Plaintiffs' claims are beyond the constitutional authority of this court. Without alleging any specific connection between themselves and the named Defendants, Plaintiffs lack essential constitutional standing requirements to bring their claims. Second, prudential limitations prohibit the court from deciding such broad questions of social importance when such claims are brought on behalf of absent third parties, as Plaintiffs attempt here. Third, the long-standing and well-reasoned political question doctrine bars the court from deciding the issue of slavery reparations, an issue that has been historically and constitutionally committed to the Legislative and Executive branches of our government. Fourth, Plaintiffs' claims are untimely. Conceding that many of the torts alleged in the Complaint occurred prior to the formal end of slavery, Plaintiffs fail to show how any of these claims fall within the applicable statutes of limitations. Finally, under the rules of procedure which guide the federal judicial system, Plaintiffs' Complaint fails to state a claim upon which relief can be granted, a serious defect the court cannot overlook regardless how egregious the circumstances giving rise to the claims.

In summary, Plaintiffs' attempt to bring these claims more than a century after the end of the Civil War and the formal abolition of slavery fails; this determination is consistent with the position taken by numerous courts which have considered the issue over the last century. Ultimately, the legal obstacles prohibiting judicial resolution of such claims cannot be circumvented by the courts. Moreover, from the onset of the Civil War until present, the historical record clearly shows that the President and Congress have the constitutional authority to determine the nature and scope of the relief sought in this case, not the courts. This is historically manifested in the signing of the Emancipation Proclamation, the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, and the promulgation of over a century of civil rights legislation and governmental programs. The sensitive ear has heard the collective "thank you" from those who were freed, as well as the historic apologies in words and deeds from persons of good will for the evils of slavery.

The court therefore finds that the defects in Plaintiffs' Second Consolidated and Amended Complaint cannot be cured by further amendment. For the foregoing reasons, Defendants' Joint Motion to Dismiss brought pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6) is granted with prejudice.

IT IS SO ORDERED.

CHARLES RONALD NORGLE, Judge
United States District Court

DATED: July 6, 2005

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JULY 6, 2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 02 C 7764

In Re: African-American Descendants Litigation

JUDGMENT IN A CIVIL CASE

* * *

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that this case is dismissed with prejudice.

Michael W. Dobbins, Clerk of Court

/s/ Eric Fulbright, Deputy Clerk

Date: 7/6/2005

(2)

No. 06-1533

FILED
JUN 20 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DEADRIA FARMER-PAELLMANN on behalf of herself and other similarly situated persons of African-American slave descent and the class she represents,

Petitioners,

v.

BROWN & WILLIAMSON TOBACCO CORPORATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF *AMICUS CURIAE* OF CAUCASIANS UNITED FOR REPARATIONS AND EMANCIPATION IN SUPPORT OF PETITIONER

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BRIEF OF CAUCASIANS UNITED FOR REPARATIONS AND EMANCIPATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae*[1] brief is submitted on behalf of the Caucasians United for Reparations and Emancipation.

I. INTEREST OF *AMICUS CURIAE*

CURE and its members have an interest in this case because the onus of slavery has been, and continues to be, upon the white citizens who have benefited from slavery and its lingering effects. For as long as we white citizens, as a class, continue to receive benefits from slavery and receive the advantage and privilege attributed to us by Jim Crow segregation and the racial discrimination and racial prejudice which endure to this day, we will be denied equality with the slave descendants.

Caucasians United for Reparations and Emancipation defines itself in its Statement of Beliefs, as "an organization of white Americans, (who) express our deep remorse for the ongoing wrongs committed by our people against Black men, women and children in the United States and throughout the Diaspora who are descendants of enslaved Africans." CURE is a non-profit membership organization organized under Section 501(c)(3) of the Internal Revenue Code representing over 120 members from twenty plus

[1] Counsel for both the Petitioner and Respondents have consented to the filing of this brief on behalf of CURE. The correspondence regarding CURE's requests for consent have been filed in the office of the Clerk. Counsel for neither party took any part in drafting this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

states across the United States, as well as supporters in Canada and the United Kingdom. Of its four publicly named officers, two have family histories rooted in Tennessee and Virginia and a third, although a transplant from South Dakota, has resided for most of her life in Georgia. Although CURE seeks to unite an international constituency in support of its cause, its roots and the roots of its leadership are in those states (Georgia, Tennessee and Virginia) in which the institution of slavery was at one time legally sanctioned in every way.

The CURE "Statement of Beliefs" goes on to say as well: "We state that full and complete reparations must be paid not only for slavery and the atrocities that flowed from slavery, but for the ongoing effects of slavery that exist today." This document mourns those losses that can never be repaired, expresses appreciation for the work of past abolitionists, finds that "the U.S. Government is obligated to provide financial and other support," identifies the wealth of "the white American aristocracy that directly benefited from slavery" as an appropriate source for the capitol resources necessary to meaningful reparations for the crimes against humanity practiced in this country's past and finally "express(es) remorse for all crimes committed in the name of white supremacy and we pray for justice to be done in the United States of America and around the earth."

Since 1992, CURE members have been active in supporting the broad movement for reparative justice. We decry the obstacles to equitable personal and collective relationships with slave descendants due to the fact that justice has been denied slave descendants and we are the beneficiaries of the denial. We decry the economic, social and cultural privileges that slavery and our history since

have given us, thus preventing equity that we so desire. We decry the unwillingness of corporations to lift the onus of slavery from us by disgorging the profits they earned by financing and owning slaves.

The advocacy and research work done by CURE are germane to this case. CURE submits this brief to illustrate the impact of the Seventh Circuit's decision on those who understand the need to repair the damage left by our nation's institutional commitment to slavery and other manifestations of the ideology of white supremacy. Certiorari review is necessary to correct the Seventh Circuit's erroneous finding that an evidentiary hearing was not required on the question of whether the statute of limitations ought to be tolled in this matter.

Given the ramifications of this case on the future of healing and reparative justice for the citizens of the United States, Caucasians United for Reparations and Emancipation is grateful to both Petitioner and Respondents for their consent for the filing of this brief *amicus curiae* in support of Petitioner.

II. SUMMARY OF ARGUMENT

The lower courts have handed the Petitioners a "double standard" of jurisprudence by expecting them to have acted with extreme diligence in pursuing their claims when it took over one and a half century for our judicial system to even recognize their right to bring a civil action against private companies. Furthermore, the lower court's decision presents a wholly inadequate analysis of the applicable statute of limitations by failing to identify which statute applies, when it began to run and whether any tolling of the statute is permitted or required by the

facts of this case. The lower court's conclusion that statutes of limitation cannot be tolled for over one hundred and fifty years is not only without any support, but is also inconsistent with state law. Finally, the decisions of the lower courts violate the state and local sovereignties' right to enact meaningful laws to redress damages stemming from the immoral and illegal act of slavery.

III. ARGUMENT

A. THE COURTS BELOW HAVE HANDED PETITIONERS A "DOUBLE STANDARD" OF JURISPRUDENCE IN DISMISSING THEIR CLAIMS WITH PREJUDICE ON THE DEFENSE OF STATUTE OF LIMITATIONS.

In dismissing the Petitioner's claims for replevin, disgorgement of illegal profits, etc., the courts below have unmercifully applied a traditional procedural defense to a most untraditional case and, in so doing, have employed a "double standard" of jurisprudence. In essence, the courts below have said that because the Plaintiffs from the Consolidated Complaint, as a representative group, have taken so long to initiate thei. claims, they are forever time barred from seeking civil redress from private corporations for wrongs committed over one hundred years ago.

The message declared by the courts below is that the former slaves themselves (and not their decedents) should have asserted their own claims for themselves and that, since they did not, too much time has passed to allow the courts to perform their function of administering justice. The District Court, in fact, stated that this case should have been brought by the emancipated slaves no later than 1865. The Seventh Circuit actually reasoned that, since many of the named Respondents were located in the

North, the emancipated slaves should have sought refuge in the protective venues of the northern courts.

The initial problem with the analysis employed by both the District Court as well as the Seventh Circuit is the classification in which the lower courts place the nature of this case. Comparing this case to those of the past involving claims made by the victims of the holocaust and the treatment of Japanese-Americans during WWII, the courts below have classified this case as yet another attempt to provide redress to a group of victims "long since dead" from a group of wrongdoers "long since dead." The conclusions of the courts below is that the controversy is "too old" and "too remote" in time to allow an effective resolution in a court of law. They defer, instead, to the legislature to create methods of redress which are, in effect, financed by society as a whole rather than any identified wrongdoer.

This case is by no means comparable to the victims of the holocaust or such. The wrongdoers named as defendants in this case are not "long since dead" but are, instead, living, thriving corporations that have survived and flourished over the past one hundred and fifty years in part on profits gained from the labor of slaves as well as the financing, insuring and transportation of slaves. The wrongdoers are very much alive today and have every resource and record of their wrongdoings stored within the very bowels of their corporate body.

The victims are, likewise, very much alive. The evils of the enslavement of African-Americans, unlike any other mistreatment of other groups across American history, did not end with the abolition of slavery. For the past one hundred and fifty years, African-Americans have been fighting their way out of the trenches of racism that was

uniquely institutionalized in America with the advent of slavery. Following President Lincoln's Emancipation Proclamation and the conclusion of the Civil War, African-Americans, particularly in the South, were not restored to equal citizenship rights with whites, much less to the basic economic status that they would have realized had their fathers, mothers, grandfathers and grandmothers been free to receive an education, work for compensation and build their economic futures for themselves and their families just as had their white counterparts. Instead, for over one hundred years following the legal abolition of slavery, African-Americans, because of the wrongs inflicted on the slaves that transcended to their children, grandchildren and great-grandchildren, were still denied the right to an education (*Brown v. Board of Education*, 347 U.S. 483 (1954)), denied the right to vote (*Smith v. Allwright*, 321 U.S. 649 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953), as well as the Voting Rights Act of 1965 (42 U.S.C. § 1973, *et seq.*)), denied the right to rent or purchase property (*Reitman v. Mulkey*, 387 U.S. 369 (1967)) and even denied the right to sit at the front of a city bus.

The lower courts questioned any provable connection between the acts of slavery and the damages sought by the Petitioners in this case. The words of the Seventh Circuit best illustrate the lower court's miscomprehension of the uniqueness of this claim:

> . . . there is a fatal disconnect between the victims and the plaintiffs. When a person is wronged, he can seek redress, and if he wins, his descendants may benefit, but the wrong to the ancestor is not a wrong to the descendants.

This is a horrifying conclusion drawn by the lower court as the wrongs committed to slaves are, by the resulting

racism, still wrongs committed even today on the descendants. Moreover, this "doubt" expressed by the lower courts in this case is completely contrary to the recognitions made even by this honorable Court:

> For this Court recognized long ago that, whatever else they (sections 1, 2 and 3 of the Civil Rights Act of 1866) may have encompassed, the badges and incidents of slavery – its "burdens and disabilities" – included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." *Civil Rights Cases*, 109 U.S. 3, 22. (fn). Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery. *Jones v. Mayer Co.*, 392 U.S. 409 (1968).

The victims of past atrocities such as the holocaust did not have to live under government sanctioned policies such as the "separate but equal" doctrine for decades after WWII. Even this honorable court, nearly fifty years after the abolition of slavery, approved disparate racial treatment and sanctioned the state's police power to prevent racial strife. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896). And this remained the constitutional law of this country for another fifty years until the 1950s when our society began its movement to accountability for wrongdoings committed over a century before. Nor can it be said that the strife is anywhere concluded. Virtually every state in

this union has in recent years enacted "hate crime" legislation aimed at redressing the very seeds of racism that were planted hundreds of years ago with the advent of slavery. How then can we sanctimoniously suggest that the current victims of slavery should have just "come to the North" to file their lawsuits in the 1850s since venue was proper in the North over many of the named defendants?

It was not until 1968 that this honorable Court recognized that Section 1982 of the Civil Rights Act applied against private acts of racial discrimination. *Jones v. Mayer Co.*, 392 U.S. 409 (1968). Conspiracy among private individuals to discriminate on the basis of race was not recognized as actionable under Section 1985 until 1971. *Griffin v. Breckenridge*, 403 U.S. 88 (1971). While society has, since the *Brown* decision in 1955, begun its slow progress on its quest for equality, these named corporate defendants have ***never*** been held accountable for the wrongs that they have committed against the African-Americans who were enslaved or to the children, grandchildren, great-grandchildren and even great-great-grandchildren of those slaves who continue today to suffer from that slavery.

The "badges and incidents of slavery" may be clearly recognized by the human soul, but it has taken our system of jurisprudence over one and a half centuries to respond to the right of the victims of this horrible institution of slavery to seek legal redress against the private individuals and corporations who only recently have made limited admissions of wrongdoings. While there may be many explanations for the incredibly slow process that our system of jurisprudence has taken, it surely cannot be denied that the most plausible explanation is that the victims themselves have been severely incapacitated in

their ability to bring this action both because of the long standing racism that followed the abolition of slavery as well as the affirmative acts of deception by the named Respondents themselves. To summarily dismiss this case with prejudice on the premise that the original emancipated slaves should have been diligent in the protection of their legal rights is a "double standard" of jurisprudence and justice to which this honorable Court should not ascribe.

B. THE SEVENTH CIRCUIT'S DECISION PRESENTS A WHOLLY INADEQUATE ANALYSIS OF THE APPLICABLE STATUTE OF LIMITATIONS.

Petitioner has presented a compelling set of facts regarding willful and intentional fraud by the Respondents and have asked the Court for nothing more than an evidentiary hearing to establish whether or not any applicable statute of limitations should be tolled. The lower courts have responded by simply stating that the Petitioner's claims are dismissed with prejudice on the basis of "the statute of limitations."

What is glaring about the rulings of the lower courts is that the courts do not identify what statute of limitation is being applied, when it began to run nor to what extent, if any, the statute was tolled. As stated above, the District Court actually stated that the claims had to have been brought by 1865. The Circuit Court makes no mention whatsoever of the specifics of which statute of limitations actually bars the claims.

There is, of course, no federal statute of limitation applicable to this case as even Section 1982 of the Civil

Rights Act has no stated period of limitation. In the absence of a federal period of limitation, it is incumbent upon the federal court to adopt the local law of limitation. *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). The problem is that this case involves claims originating out of several states and the decisions of the lower courts do not identify which statute of limitation is applied, let alone do they address why one state's period of limitation should be selected over another's nor when that period of limitation would begin to run.

Rather than addressing these specific questions, the lower courts chose to jump directly to the issue of tolling of the period of limitation on the basis of fraud alleged by the Petitioners. Again, the lower courts do not identify what state concept of fraud is to be applied. The state law applied, however, is critical to a just resolution of this issue. In Georgia, for example, where a defendant is accused of concealing material facts, no other independent fraudulent act is required to toll the statute and the defendant's continued silence is treated as a continuation of the original act of fraud. *McClendon v. Georgia Kaolin Co.*, 782 F. Supp. 1548 (M.D. Ga. 1992), summary judgment den., 813 F. Supp. 834 (M.D. Ga. 1992), motion den., 822 F. Supp. 1580 (M.D. Ga. 1993), summary judgment den., 837 F. Supp. 1231 (M.D. Ga. 1993), motion granted, 841 F. Supp. 415 (M.D. Ga. 1994) and motion granted, habeas corpus den., 837 F. Supp. 940 (C.D. Ill. 1993). If Georgia law were applied to the only facts of record which evidence concealed facts by, at least, J.P. Morgan Chase, then the statute of limitation as to that Respondent may well have been tolled until the disclosure of 2004. Thus, the question that was before the lower courts and which should have been answered is whether or not material

facts were known by the Respondents, concealed by the Respondents and whether or not the Respondents continued their silence. All of these are pivotal issues in answering the question of whether or not fraud by the Respondents would serve to toll the statute of limitations. None of them are addressed at all by the lower courts.

The essence of the lower courts' rulings, unfortunately, is the general conclusion that, even if facts exist which support some tolling, the statute of limitations cannot be tolled for over a hundred and fifty years. No logic is given by either of the lower courts and absolutely no state citation is offered in support of this conclusion. Under Georgia law, the lower courts would be absolutely incorrect in their conclusion as the appellate courts of Georgia have ruled that the sun *never* sets on fraud when it comes to the tolling of the statute of limitations. *Hill v. Fordham*, 186 Ga. App. 354, 367 S.E.2d 128 (1988). Similar principles are supported by the Courts in *Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck*, 507 F. Supp. 873 (D.S.D. 1981); *Bomba v. W.L. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978).

1. Inaction Risks Forever Denying Legal Recourse

The record below and the Petitioner's Brief for Certiorari as well as the website of the Restitution Study Group (www.rsgincorp.com) recount the painstaking political work and research efforts necessary to make available the factual basis for the complaint below. The Petitioner's Brief to this Court makes clear that care was taken by Plaintiffs to bring their action within two years of piecing together the evidentiary chain which fingers Respondents

as culpable for their illegal involvement in the slave industry.

If the statute of limitations cannot be tolled in this case, brought to bar in a timely manner after the revelation of the facts asserted by the original Consolidated Complaint, then they will forever be barred on similar grounds. For this Court to deny this Petition for a Writ of Certiorari at this junction will serve to forever close off a legal recourse for the grievous wrongs which all agree constituted the institution of slavery in this nation.

The District Court below argues that the stain of slavery has been adequately repaired by the sacrifices made during the Civil War and the Congressional action in the wake of that war to amend the U.S. Constitution and to enact Civil Rights laws. An honest assessment of the state of race relations in the United States shows the inadequacy of such measures if they were truly intended for that purpose.

But until the evidence linking the criminal behaviors of the Respondent corporations was revealed in the 2004 disclosures of J.P. Morgan Chase, the post-Civil War Congressional actions alone were not sufficient to permit this case to be made.

2. Statute of Limitations serves no public interest in this matter

Statute of Limitations serve an important public interest by protecting a Defendant from having to defend an ancient action for which all the evidence and the witnesses are gone. A Statute of Limitations protects defendants from being convicted by the lapse of time.

But in this matter, a statute of limitations serves no public interest. There is no factual dispute as to the involvement of the Respondent Corporations in financing slavery and, sometimes, in owning slaves. The complaints below are largely based on the admissions of corporations based on a search by those corporations of their own archives.

Surely they do not now assert that there are circumstances not available now in the historic record which somehow ameliorates their responsibility for their actions or those of their predecessor corporations. Surely they do not assert that the ill-gotten gains, the fruit of their involvement in the immoral slave trade are somehow washed clean of those past actions by the passage of time.

The question is not whether these corporations engaged in the behavior they are accused of. They have already acknowledged that in fact they were. The question before the Courts now is to what extent are the assets now enjoyed by these Respondents the result of their participation in the crimes against humanity which the slave trade represents.

3. Respondents are not disadvantaged

This case does not hinge on whether they participated in the slave trade, as their participation has already been acknowledged by officers for the Respondent corporations in public filings, statements and documents. The Respondents are not disadvantaged by tolling the statute, and the statute therefore serves no public purpose in this matter.

The Respondents are not disadvantaged. They still have access to all they need. They have paid money to

maintain their corporate archives over the years. If the Respondents are not damaged, then the statute of limitations doesn't serve the public interest. They are no worse off in being able to defend themselves than they were one hundred years ago.

C. THE SEVENTH CIRCUIT'S DECISION DENIES STATES' RIGHTS TO PROVIDE REMEDY FOR CONFISCATED WAGES AND ILLEGAL ENRICHMENT.

Elected state Assemblies in their wisdom have enacted statutes in California, Illinois and Iowa to require public disclosure of past corporate involvement with the institution of slavery as a condition of offering insurance products to consumers in those states. In their collective wisdom, the elected governing municipal bodies of Berkeley, Los Angeles, Oakland, Richmond and San Francisco California; Chicago, Illinois; Detroit and Wayne, Michigan; Cleveland, Ohio and Philadelphia, Pennsylvania have enacted ordinances requiring disclosures by corporations of their past involvement in the slave industry for contractors doing business with the City. *Amicus Curiae* here calls to the attention of the Court the research found at www.rsgincorp.com which is too voluminous to include within the page limitations of this brief.

This action arises as a result of very recent voluntary disclosures made by the Respondent Corporations in compliance with state statutes and municipal ordinances requiring these disclosures as a condition of licensing and public contracts. These state laws and local ordinances were enacted to force disclosure that had been withheld by corporations directly involved in the slave industry over one hundred and fifty years ago.

There can be only one conclusion drawn from the enactment of these state and local laws: It is the intent of those sovereignties to bring to justice wrongdoings committed by living, thriving corporations which were involved in the slave industry. If the decisions of the lower courts are upheld, then the obvious result is to deprive these state and local governments any real meaning to their quest. In short, if these decisions stand without review, then the valiant acts of these local governments will be stripped of any meaningful purpose.

In defending the constitutionality of the 1866 Civil Rights Act, Senator Trumbull of Illinois said:

> . . . the trumpet of freedom that we have been blowing throughout the land has given an 'uncertain sound,' and the promised freedom is a delusion. . . . I have no doubt that . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional (thirteenth) amendment amounts to nothing. Cong. Globe, 39th Cong., 1st Sess. 322 (cited in) *Jones v. Mayer Co.* 392 U.S. 409.

The decisions of the lower courts in this case have rendered the enactments of the state and local governments a "trumpet with an uncertain sound" thus depriving those sovereignties of their constitutional right to redress these historic wrongdoings.

Nor should it be concluded that compliance with these voluntary disclosure laws shields Respondents from culpability for their previous wrongdoings. These corporations could have as easily chosen to refrain from seeking business with those state and municipal governments which found it to be sound public policy to require such disclosure. By so doing they could have perpetuated their

fraud, which can only be resolved by the disgorgement of their ill-gotten gains.

IV. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be GRANTED.

This 20th day of June, 2007.

Respectfully submitted,

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